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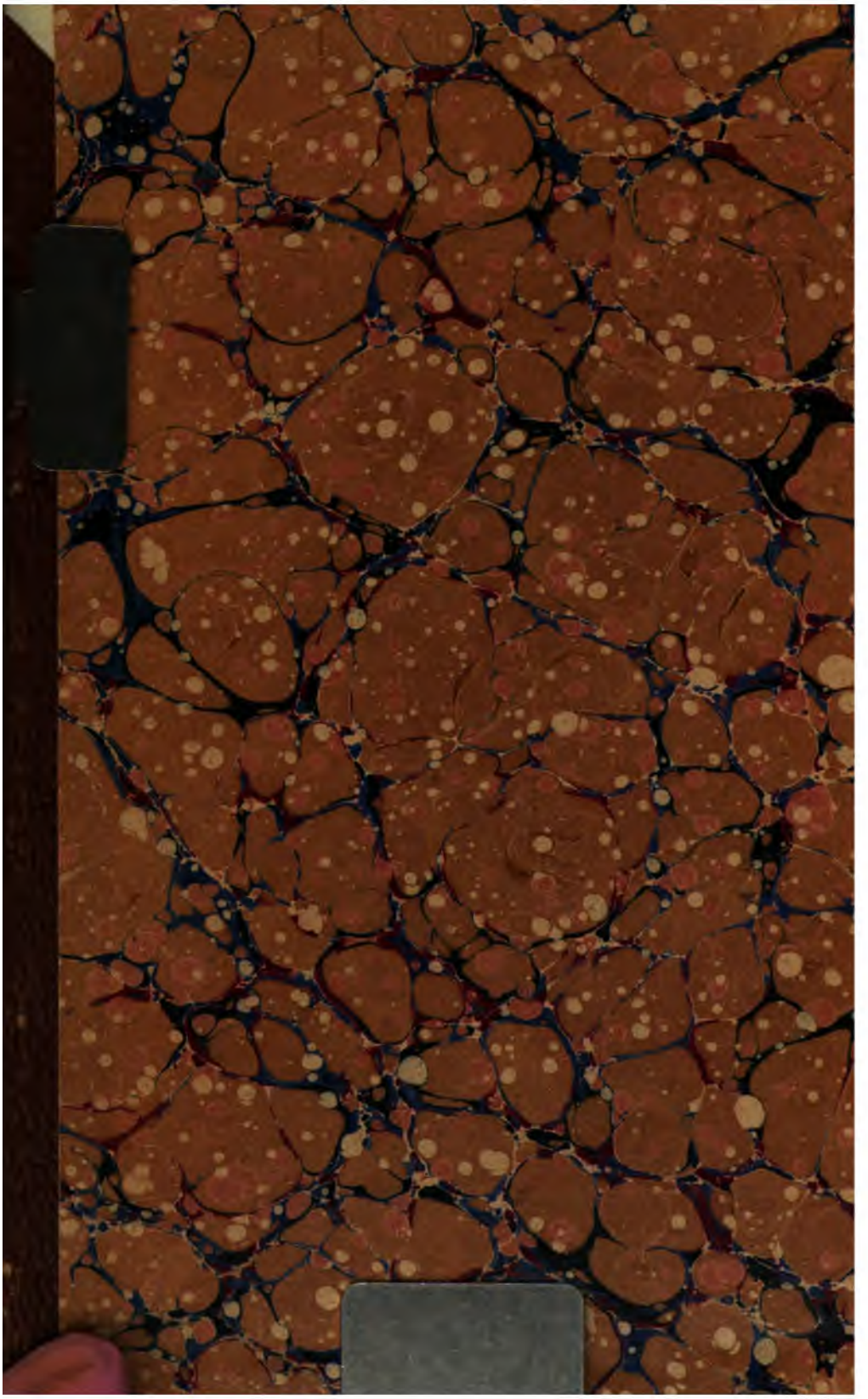

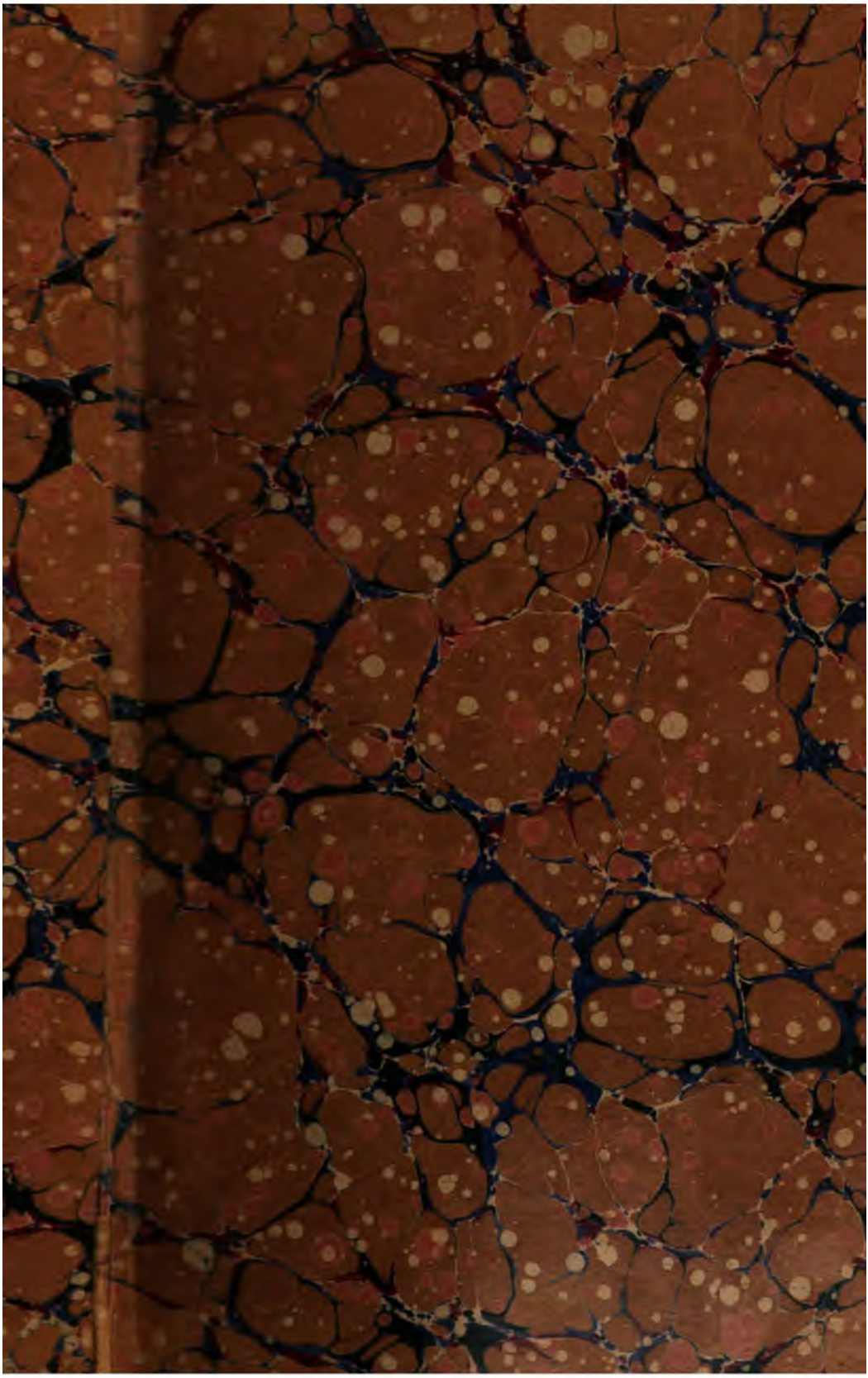

ATTORNEY
No 40 SOUTH THIRD
PHILADELPHIA

A Treatise

UPON

THE LAW

OF

PRINCIPAL AND AGENT

IN

CONTRACT AND TORT.

BY

WILLIAM EVANS, B.A. Oxon.,
AND OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

FROM THE SECOND (1888) ENGLISH EDITION.

"The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases."—*Lord Mansfield.*

WITH NOTES AND AMERICAN CASES,

BY

J. CLAUDE BEDFORD,
OF THE PHILADELPHIA BAR.

VOL. I.

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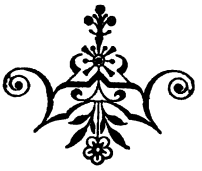

PREFACE.

THE present Edition contains upwards of 500 cases more than the former Edition; the Index has been consequently much enlarged. The latest decision cited is the case of *Harker* v. *Edwards*, which was decided in the Court of Appeal on the 22nd November last. Each paragraph of the text has been headed with a short summary of its contents. The original design of the Work has been retained with little modification; the new cases have been introduced into the text, and the notes have been reserved for references only. The cases relating solely to the liability of an employer for injuries caused by the negligence of a fellow-servant, are omitted from this Edition.

I am informed that two or three editions of this Work have been published in the United States; but as I know nothing of their publication, and have not seen a copy of any of them, I am unable to say anything respecting them.

WILLIAM EVANS.

3, ESSEX COURT, TEMPLE,
December, 1887.

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THE LAW

OF

PRINCIPAL AND AGENT.

BOOK I.

OF THE CONTRACT GENERALLY; ITS ORIGIN AND DISSOLUTION.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

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Agent defined.]—An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified (*a*).[1] In every definition of an agent, the one element in com-

(*a*) Co. Litt. 207; Wolf *v.* Horncastle, 1 Bos. & Pul. 316.

[1] The *mandatum* of the Roman law somewhat resembled the agency of the Common law. There were, however, some striking differences.

All contracts entered into by the mandatary, [or agent] bound him personally and nothing done by him in the execution of the power conferred by the *mandatans* [or principal] affected the *mandans*. The Roman law required that the minds of the parties should meet before they could be bound by a contract; the mandans not being a party to the contract, was not bound. On the other

mon is the recognition of the derivative authority of the agent; and this element is really the *differentia* of an agent (*b*).

[★ 2] ★ *Principal defined.*]—The person from whom the authority is derived is generally called the principal or employer, more rarely the constituent; whilst the agent is sometimes called an attorney, delegate or proxy. A principal may be disclosed or undisclosed. A person is not an undisclosed principal in respect of a contract, unless the parties who allege that he is a party to the contract as such principal may be sued by him as well as he by them (*c*). The contract which exists between the principal and agent is called a contract of agency; the right of the agent to act in the name or on behalf of another is termed his authority or power; and this, if conferred formally by an instrument under seal, is said to be conferred by a letter of attorney or power of attorney. An agent will not be permitted to turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure (*d*).

Varieties of agents.]—Agents are divided,

(a.) In respect of the extent of their authority, into
Universal;
General;
Special or particular agents:

(b.) In respect of the nature of the agency, into
Mercantile and
Non-mercantile agents:

(c.) In respect of their liability in selling, into
Del credere agents and
Such as are not *del credere:*

(d.) In respect of the extent of their duties, and of the amount of skill required of them, into
Gratuitous and
Paid agents;
Professional and
Unprofessional agents.

(*b*) Com. Dig. "Attorney," A.; 1 Livermore, 67; Story, § 3; Smith, M. Law, 109; Ind. Contract Act, s. 182.

(*c*) See per Lord Esher, M. R., in United, &c. Association *v.* Nevill, 19 Q. B. D. 110, 116.

(*d*) Williamson *v.* Barbour, 19 Ch. Div. 529; 50 L. J., Ch. 147; 37 L. T. 698.

hand the *mandans* agreed to indemnify the mandatary, who alone could sue and be sued upon the contracts entered into by him.

Originally third persons had no right of action against the *mandans*, but subsequently the prætor subrogated them to the rights of the mandatary to idemnity. Under the Common law the acts of the agent are binding upon the principal and not upon himself.

For his services the agent is entitled to compensation, not so with the mandatary who acted gratuitously. Generally a contract made by the agent after the death of the principal is void, the reason of this being that a dead man cannot contract; but where the *mandans* was dead the mandatary was still bound, the contract having been made by him and not binding upon the principal.

A number of other divisions might be readily framed by assuming other points of difference as the basis of division.

General and special agents.—General agents are such as are authorized to transact all business of a particular kind (*e*); whilst a special agent is authorized to act only in a single ★ trans- [★ 3] action (*f*).[1] The distinction between special and general agents is of little or no practical value, so far, at least, as regards the principal and third parties. Whenever a dispute arises between them with reference to the authority of the agent, the question is not simply whether the authority is special or general, but it may also be very necessary to inquire, as will appear hereafter, whether the agent's acts are within the apparent scope of his authority.[2] If the agent exceeds his special authority, and in so doing makes his principal liable, the latter is entitled to claim compensation from the agent for such damages as have resulted from the unauthorized act.

Factors.]—A factor is an agent for the sale of goods in his possession, or consigned to him.[3] He is often called a commission merchant or consignee.[4] He is called a supercargo, if authorized to sell a cargo which he accompanies on the voyage. He is to be distinguished from a mere salaried agent who is entrusted with goods for sale (*g*).

Del credere *agents.*]—*Del credere* agents are distinguished from other agents by the fact that they guarantee that those persons to whom they sell shall perform their part of the contract. A *del credere* agent is not responsible to his principal in the first instance (*h*), though the contrary opinion at one time prevailed.

(*e*) Gilman *v.* Robinson, Ry. & Moo. 227; Kaye *v.* Brett, 5 Ex. 269.

(*f*) Brady *v.* Todd, 9 C. B., N. S. 592; see Whitehead *v.* Tuckett, 15 East, 400.

(*g*) *In re* Herman Loog (Limited), W. N., Aug. 20, 1887, p. 180

(*h*) Hornby *v.* Lacy, 6 M. & S. 166.

[1] Where an agent has authority to buy cotton in a certain region and its vicinity, and to buy generally from whomever the agent, not his principals, might determine, one having in view not merely a single transaction or a number of specified transactions but a class of purchases and a department of business, makes a general agency to buy the cotton there. Butler *v.* Maples, 9 Wallace, 766. A principal is estopped from denying that his agent had certain powers, when, by his conduct or declarations, he has induced third persons to believe that the agent actually had such powers. Golding *v.* Merchant & Co., 43 Ala. 705.

The U. S. Life Insurance Co. *v.* The Advance Co., 80 Illi. 549. The fact that the authority of an agent is limited to a particular business does not make his agency special; it may be general in regard to that business, as though its range were unlimited. Cruzan *v.* Smith *et as.*, 41 Ind. 288; Anderson *v.* Coonley, 21 Wendell, 279.

[2] The question as to the extent of the agent's power is one for the jury, under proper instruction from the court. Golding *v.* Merchant & Co., *supra.* Dickenson County *v.* Insurance Co., 41 Iowa 286.

[3] Story on Agency, § 33. A home factor is one who resides in the same State or country with the principal; a foreign factor, one who resides in a foreign State or country, *id.*

[4] Story on Agency, § 33, note 3.

Brokers.]—The true definition of a broker, it has been said, is that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. A broker is a mere negotiator between the other parties.[1] If the contract which the broker makes between the parties is a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. Whatever may be the effect of a contract as between the principals, in either case no effect goes out of the broker. If he signs the contract, his signature has no effect as his, but only because it is, in contemplation of law, the signature of one or both of the principals: no effect passes out of the broker to change the property in the goods. When the goods sold are in existence the broker now frequently passes a delivery order to the vendor to be signed, and on [★ 4] its being signed he passes it to ★ the vendee. In so doing he still does no more than act as a mere intervener between the principals. He himself, as broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods should be delivered to buyer or seller, or either. He is throughout merely the negotiator between the parties. Provided the broker acts as broker, and makes no contract in his own name, he cannot be sued by either party to the contract for any breach of it (*i*).[2] An agent who merely negotiates a personal contract for work and labour is not a broker (*k*). According to the business in which they engage, brokers are called exchange brokers, stockbrokers, merchandize brokers, ship brokers, and insurance brokers.[3]

Brokers and factors distinguished.]—The distinction between a

(*i*) See per Brett, J., Fowler v. Hollins, L. R. 7 Q. B. 616.
(*k*) See Milford *v.* Hughes, 16 M. & W. 177; per Rolfe, B.

[1] A broker may be the agent of both parties to a sale for the purpose of signing a memorandum of the sale. Schlessinger *et al. v.* Texas and St. Louis R. R., 13 Mo. Ap. 471. Other cases in which one can be agent for both parties see Hinckley *v.* Arey, 27 Me. 362; Woods *v.* Rocchi, 32 La. An. 210. See also Raisin *v.* Clark, 41 Md. 158, for a case in which a broker was not allowed to act as agent for both. Where the interests of the parties conflict, he cannot act for both; as where an exchange of lots was effected by a broker, he cannot recover commissions from the owner of each lot. Pugsley *v.* Murray, 4 E. D. Smith (N. Y.), 245. In this case the Court said, "It may be that such compensation might be recovered where, with full knowledge of the fact that the broker was employed by both, and expected pay from both, the party actually promised such payment; but without evidence of that knwledge and promise, the broker cannot recover from both parties for the same service."

[2] There are three cases in which the agent becomes personally liable; first, where the principal is not known; secondly, where there is no responsible principal; thirdly, where the agent becomes liable by any undertaking of his own. Hasting *v.* Lovering, 2 Pick. 221; Stackpole *v.* Arnold, 11 Mass. 29; Lazarus *v.* Shearer, 2 Ala. 718.

[3] Also marriage brokers. All contracts entered into with such brokers are void and cannot be enforced on the ground of public policy. Crawford *v.* Russell, 62 Barb. (N. Y.) 92.

broker and factor has been thus stated by Chief Justice Abbott, in the well-known case of *Baring* v. *Corrie* (*l*): "The distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal.[1] The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation—he is not trusted with the possession of the goods, and he ought not to sell in his own name.[2] To the same effect Mr. Justice Holroyd observed, in the same case, that a factor "is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, he has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority, and it may be right, therefore, that the principal should be bound by the consequences of such sale—amongst which the right of setting off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as ★a [★ 5] broker does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound."

The following enactments relate to brokers acting within the City of London or the liberties thereof—6 Ann. c. 16, s. 4; 57 Geo. 3, c. 60, s. 2; and 33 & 34 Vict. c. 60. For the construction put upon the term "broker" by these acts reference may be made to the following cases: *Scott* v. *Cousins* (*m*), *Clark* v. *Powell* (*n*), *Scott* v. *Jackson* (*o*), *Smith* v. *Lindo* (*p*), *Gibbons* v. *Rule* (*q*), *Wilkes* v. *Ellis* (*r*), *Milford* v. *Hughes* (*s*).

Insurance brokers.]—An insurance broker "is agent for the assured, and also for the underwriter.[3] He is agent for the insured,

(*l*) 2 B. & Ald. 143. (*m*) L. R., 4 C. P. 177. (*n*) 4 B. & Ad. 846.
(*o*) 19 C. B., N. S. 134. (*p*) 4 C. B., N. S. 395, 597. (*q*) 4 Bing. 301.
(*r*) 2. H. Bl. 555, (*s*) 16 M. & W. 174.

[1] Slack *v.* Tucker, 23 Wall. (U. S.) 321. See Perkins *v.* State, 50 Ala. 154.

[2] Where the broker entered into a contract in his own name without the knowledge of his principal, and the principal gave possession of the goods to the purchaser, the Court held that payment by the purchaser to the broker under such circumstances, would not be a bar to the right of recovery by the owner. Crosby *v.* Hill, 39 Ohio St. 100.

[3] A foreign insurance broker becomes liable to the penalty when acting for a company which has not complied with the statutes of the particular State. Ehrman *v.* Tuetonia Ins. Co., 1 Fed. Rep. 471. See Waynesboro' Ins. Co. *v.* Conover, 98 Pa. St. 384, and Smith *v.* National Life Ins. Co., 103 id. 177; Ins. Co. *v.* Cusick, 109 id. 158.

first in effecting the policy, and in everything that has to be done in consequence of it;[1] then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter; but the whole account with respect to the premium, after the insurance is affected, remains a clear and distinct account between the underwriter and the broker." Exclusive of fraud, and other similar circumstances, there is an end of everything with respect to the premium as between the insurer and insured (*t*).[2]

Vendees and del credere *agents distinguished.*]—The distinction between a *del credere* agent and a vendee was strongly insisted upon in *Ex parte White, re Nevill* (*u*), which was decided in 1870. This case decides,—

(1.) That a consignee who is at liberty, according to the contract between him and the consignor, to sell at any price he likes, and receive payment at any times he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, is not a *del credere* agent.

(2.) That an assumption on the part of the consignor and consignee that the relation subsisting between them is the relation of principal and agent, affords no evidence of the existence of such a relation, if the course of dealing between them is not consistent with the existence of such relation.

[★6] ★ (3.) There is a distinction between a *del credere* agent and a consignee who is an agent until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit, and sold them again on his own account.

In *Ex parte White* (*v*) a partner in the firm of A. and Co. was in the habit of receiving goods on his private account from B. and Co., accompanied by a price list. No restriction was placed upon A. in selling the goods, but he sent a monthly account of his sales to B. and Co., debiting himself with the price named in the price list. In paying B. and Co., no reference was made to the price at which the goods were sold by A. He bought the goods on his own credit, and sold on his own account. "It is quite clear," said Lord Justice Mellish, "that A., if he sold these goods, was to pay

(*t*) Per Mansfield, C. J., in Minett *v.* Forrester, 4 Taunt. 541, note.
(*u*) L. R., 6 Ch. 397; and see Hutton *v.* Lippart, 8 App. Ca. 307.
(*v*) *Supra.*

[1] When agent of insured and not of insurer, see Pottsville Ins. Co. *v.* Fromm, 100 Pa. St. 347.

[2] Crousillat *v.* Ball, 3 Yeates (Pa.), 375; Wood *v.* Fireman's Ins. Co., 126 Mass. 316. A case in which the broker is not agent for both, see Pottsville Mutual Ins. Co. *v.* Minnequa Sp. Imp. Co., 100 Pa. St. 137. So far as the insurance agent acts as insurance broker he is agent for the insured and not the insurer. Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502. As to the power of an agent of two insurance companies to cancel a policy of insurance in one company and to issue a new policy in its stead in the other, without notice to the insured, see Lancashire Ins. Co. *v.* Nill, 114 Pa. St. 248.

B. and Co. for them at a fixed price—that is to say, a price fixed beforehand between him and them—and also at a fixed time. Now, if it had been his duty to sell to his customers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a *del credere* agent, because I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal, and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them ;[1] and, therefore, if he sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but he is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. He is not guaranteeing the performace by persons to whom he sells of their contract with him, which is the proper business of a *del credere* agent ; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly ★ independent of what the contract may be which he makes [★ 7] with the persons to whom he sells ; and my opinion is, that in point of law, the alleged agent in such a case is making on his own account, a contract of purchase with his alleged principal, and is again reselling. The case is, of course, still clearer if the consignee be allowed to change the character of the goods ; *e. g.*, to grind corn, or dye or bleach goods.

Ireland v. *Livingstone examined.*]—In *Ireland* v. *Livingstone* (*x*), the defendants wrote to the plaintiffs, who were commission agents at Mauritius, "You may ship me 500 tons to cover costs, freight and insurance; 50 tons more or less of no moment." A maximum price was named. According to the custom in the sugar trade, it was not usual or even possible to buy the whole of the sugar at once; but shipments were made of less than the quantity ordered. The plaintiffs being unable to obtain more than 400 tons, shipped that quantity, and, as the defendant refused to accept, brought an action for the non-acceptance.

(*x*) L. R., 2 Q. B. 99; 5 *ibid.* 516; and L. R., 5 E. & I. Ap. 395.

[1] A *del credere* agent is the same as any other agent except that he guarantees that the person with whom he deals will keep his part of the contract. On account of this risk he is entitled to additional compensation for his services. Story on Agency, § 33; Lewis *v.* Breme, 33 Md. 412 ; Holbrook *v.* Wright, 35 Am. Dec. 607.

An examination of the judgments of the several learned judges shows that there were two material questions involved in the case. The first related to the relation existing between the plaintiffs and the defendant—was that relation that of principal and agent, or that of vendor and vendee? The other related to the construction of the instructions sent by the defendant—was the order given for an entire quantity to be shipped in one ship, or was a discretion allowed? Upon the former question a difference of opinion existed among the judges who touched upon it. Baron Martin, in the Exchequer Chamber, relying upon *Feise* v. *Wray* (*y*) and *Kreuger* v. *Blanck* (*z*), thought there could be no doubt that the relation existing was that of vendor and vendee. Baron Cleasby and Mr. Justice Byles were of the contrary opinion, and Mr. Justice Blackburn, in his elaborate opinion, delivered before the House of Lords, explained the two-fold character of consignors. "If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. . . . Every party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, [★ 8] and ★therefore no commission is charged. But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature." His lordship then proceeds to examine the argument of Martin, B.: "It is quite true that the agent who, in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them . . . . the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*." This, however, is no reason for saying that it is not a contract of agency. "When the order was accepted by the plaintiffs, there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered, at or below the limit given." After having heard the opinions of the judges, the learned lords decided, that the question was one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendant, so as to give them a right of stoppage *in transitu*, following the opinion of Mr. Justice Blackburn.

(*y*) 3 East, 93.
(*z*) L. R., 5 Ex. 179.

The position of branch banks.]—Branch banks are agencies of the principal banking corporation or firm; the branches and the firm are identical. In *Prince* v. *Oriental Bank Corporation* (*a*), a promissory note payable at a branch bank became due, and the manager cancelled it as paid, remitting to the principal bank a draft for the amount in favour of the bankers of the payees. The note, however, had not been paid, but was dishonoured. The next day the manager of the bank wrote to the manager of the principal bank requesting him to cancel the draft. The dishonoured note was returned indorsed "Cancelled in error." Neither the payees nor their bankers were informed that the note had been paid. The Privy Council applied the above rule, ★ and, affirming the [★ 9] judgment of the court below, held that the payees could not maintain an action for money had and received against the principal bank.

Telegraph Companies.]—There is no contract of agency between a telegraph company and the recipient of a telegram. Hence the company is not liable to the latter for damages incurred by reason of the mistake of the telegraph clerk (*b*).[1]

Change in character of agency.]—The character of an agency may of course be changed, and such a change will involve a change in the rights and liabilities of the parties. Thus the question may be whether a carrier has become a warehouseman, as in *Chapman* v. *Great Western Ry.* (*c*). A railway company may be carriers, common carriers, or warehousemen of passenger's luggage (*d*). An agent to receive money or goods for the use of his principal cannot by a mere notice from a third person be converted into an implied trustee. His possession is the possession of his principal (*e*). The same principle was laid down by the King's Bench in *Dixon* v. *Hamond* (*f*), by the Common Pleas in *Gosling* v. *Birnie* (*g*), and by the Exchequer in *Roberts* v. *Ogilby* (*h*).

Cab-driver and cab-owner.]—Where a cab-driver uses the cab at his pleasure during the day and pays the owner a certain sum for its use, their relation is not that of master and servant, but that of bailor and bailee (*i*).

(*a*) L. R., 3 P. C. Ap. 325; 38 L. T. Rep., N. S. 41.
(*b*) Dickson *v.* Reuter's Telegraph Co., Limited, 3 C. P. Div. 1; 47 L. J., C. P. 1.
(*c*) 5 Q. B. D. 278.
(*d*) See per Lord Esher, Bunch *v.* G. W. Rail. Co., 17 Q. B. D. 215.
(*e*) Nickolson *v.* Knowles, 5 Mad. 47.
(*f*) 2 B. & Ald. 310.
(*g*) 7 Bing. 339.
(*h*) 9 Price, 269.
(*i*) Fowler *v.* Lock, L. R., 7 C. P. 272; 10 *ib.* 90; Venables *v.* Smith; 2 Q. B.

[1] The law in this country is that telegraph companies are the agents of both parties and are liable to both for the negligence of their servants. N. Y. Tel. Co. *v.* Dryburg, 35 Pa. 303; Elwood *v.* Western U. Tel. Co., 45 N. Y. 549; Bank *v.* W. U. Tel Co., 52 Cal. 280; W. U. Tel. Co. *v.* Fenton, 52 Ind. 1.

Agent distinguished from stakeholder.]—Where a deed of composition with creditors was executed, under the terms of which certain persons, being trustees under the deed, were in possession of promissory notes given to satisfy the amount agreed on as the composition, such trustees were, as between the parties, held to be stakeholders, and not the agents or servants either of the persons who gave the notes or of the persons who, under the provisions of the deed, would be entitled to receive them (*j*).[1]

[★10] ★ *Partners—Caretakers.*]—The relation of master and servant, or principal and agent, was distinguished from cases of partnership in *Robinson* v. *Finlay* (*k*), and the relation of employer and caretaker from that of landlord and tenant in *Yates* v. *Charlton-upon-Medlock Union* (*l*). As to the facts which go to prove agency, see further *Sykes* v. *Howarth* (*m*).

The courts will not enforce a contract of agency *e. g.*, a contract to employ a shipping broker (*n*), or auctioneer (*o*)

D. 283; Powles *v.* Hider, 6 E. &. B. 207; and see King *v.* Spurr, 8 Q. B. Div. 104, where the defendant owned the cab only.

(*j*) Latter *v.* White, L. R., 5 H. L. 578.

(*k*) 9 Ch. Div. 487.

(*l*) 48 L. T. 872.

(*m*) L. R., 12 Ch. 826; 48 L. J., Ch. 469.

(*n*) Brett *v.* E. I., &c. Shipping Co., 2 H. & M. 404.

(*o*) Chinnock *v.* Sainsbury, 30 L. J., Ch. 409. See Fry, Sp. Per., 2nd ed., 42.

[1] Where an agent, as for example, an auctioneer, receives goods or money as a stakeholder, he cannot deliver up possession of the thing deposited until the conditions are fully complied with. In case of dispute between the claimants a bill of interpleader should be filed. Edwards *v.* Hodding, 5 Taunton, 815.

★ CHAPTER II. [★11]

PARTIES TO THE CONTRACT.

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SECT. 1.—*The Principal.*

The rule at common law.]—It may be laid down generally that any person *sui juris*, unless prohibited by the municipal law to which he is subject may be either a principal or an agent. Inasmuch, however as the same exceptions do not apply to both principals and agents, we shall first consider what persons may be principals, so as to invest another with authority to act for them. By the common law all persons who have power to ★ do a thing in [★12] their own right, may do it by an agent; in other words, transfer that power to another (*a*). The reason of the limitation implied in the words "in their own right," will appear when the subject of

(*a*) Coombe's case, 9 Co. Rep. 756; Com. Dig. "Attorney," c. 1.

delegation is discussed. From the above rule it will be clear that in order to discover who may or may not be a principal, recourse must be had to the rules of disability recognized by the law of contracts generally.

Grounds of disability — Natural or legal incompetency.]— An elementary principle of the law of contracts is that no contract is binding unless based on the assent of the parties to do or not to do some act or acts (*b*), and clearly no assent avails unless the party assenting is capable of doing so at law. The incompetency to contract here indicated is of two kinds. It is either natural or legal. By natural incompetency is meant an incompetency directly traceable to a mental defect, whether chronic or temporary ; by legal incompetency, an incompetency other than natural in the above sense, directly traceable to a provision of municipal law. The incompetency of lunatics, idiots, and drunkards, is of the former kind ; that of aliens, infants, married women, outlaws and convicts, and seamen, of the latter kind. Incompetency is either absolute or limited ; and its effect may be either to make a contract altogether void, or to give to one party rights denied to the other, as formerly in the case of the voidable contracts of infants made with persons competent to contract (*c*).

Natural incompetency — Idiots, lunatics, persons not sui juris, *drunkards.*]—First, as to disability on the ground of natural incompetency, Mr. Justice Story lays it down broadly that idiots, lunatics, and other persons not *sui juris*, are wholly incapable of appointing an agent (*d*). This cannot be accepted without qualification as the law of this country, for it has been distinctly laid down by the Court of Exchequer Chamber, after a review of the cases, that when one of the parties to a contract is of unsound mind, and the fact is unknown to the other contracting party, no advantage having been taken of the lunatic, this unsoundness of mind will not vacate a contract, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be [★ 13] restored altogether ★ to their original position (*e*).[1] It is

(*b*) Jackson *v.* Galloway, 6 Scott, 786 ; 1 Pot. on Obl. I., 112.
(*c*) Bac. Abridg. Infancy, I., 3.
(*d*) Story on Agency, § 6.
(*e*) Milton *v.* Camroux, 4 Ex. 17.

[1] In a New Jersey case in which the American authorities on the subject were discussed, it was held that the contracts of lunatics and insane persons were invalid, and not binding, but with this qualification : that if the agent of A. dealt with B. or his agent in the ordinary course of business in good faith, without any knowledge of the insanity of B. and without knowledge of such circumstances as would put a reasonably prudent man upon inquiry, then that would be a good bargain and neither B. nor his representative could set up the insanity against it.

From this it appears that a contract made with a lunatic or his agent, if made without the knowledge of his insanity, and in good faith, and not under such circumstances as would put a prudent man upon inquiry, may be enforced. Matthiessen *v.* McMahon's Adm., 38 N. J. Law 536.

conceived that the same result would take place, if the contract were made through another who acted upon the authority of the lunatic, without having been aware or taken advantage of his state of mind. The principle of the above decision was acted upon in a more recent case, *Beavan* v. *M'Donnell* (*f*). As to the disability of drunkards, the rule is, that if a person makes a contract in such a state of drunkenness as not to know what he is doing, the other contracting party, who knew him to be in that state, cannot compel him to perform the contract (*g*), which, however, is not void, but voidable only, and so may be ratified in a sober moment (*h*).

The contracts of infants[1]*—The Infants' Relief Act*, 1874.]—The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), enacts that all contracts entered into by infants for the repayment of money lent, or for goods supplied (other than contracts for necessaries), and all accounts stated with infants, and all contracts voidable before the passing of this act, shall be absolutely void. In cases not touched by the Infants' Relief Act, 1874, the validity or invalidity of all contracts and acts done by an infant or on his behalf, during infancy, or immediately subsequent whilst under the influence of those who had the control over him during that period, is determined by a reference to the injurious or beneficial character of the contract to the infant. Those contracts of infants are held to be absolutely void which are to his prejudice, or in which there is no apparent benefit or semblance of benefit to the infant (*i*).

Right of married woman to appoint an agent.]—The competency or incompetency of a married woman to appoint an agent, turns upon the nature of her rights, that is to say, upon the question whether they are those of a *feme covert* or those of a *feme sole*. The power

(*f*) 9 Ex. 309. (*g*) Hamilton *v.* Grainger, 5 H. & N. 40.
(*h*) Matthews *v.* Baxter, L. R., 8 Ex. 132.
(*i*) See Chambers on Infancy, p. 452, and cases there cited.

In Lincoln *v.* Buckmaster, 32 Vt. 652, it was held that where one contracted with a lunatic in good faith believing him to be of sound mind the contract could not be enforced because the circumstances were such that a prudent man would have suspected the insanity.

The authority of an agent is revoked by the insanity of the principal. This principle does not apply where the power is coupled with an interest nor to cases which fall under the qualifications mentioned in Matthiessen *v.* McMahon, *supra*. The better opinion seems to be that the insanity of the principal operates *per se*, as a revocation of the agent's power and it is not necessary that the fact of insanity should be first established by an inquisition. Davis *v.* Lane, 10 N. H. 156. Matthiessen *v.* McMahon, *supra*.

[1] An infant is not legally capable of appointing an agent. Trueblood *v.* Trueblood, 8 Ind. 195; Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Waples *v.* Hastings, 3 Harrington (Dela.) 403; Cole *v.* Pennoyer, 14 Illi. 158; Strain *v.* Wright, 7 Ga. 568; Baker *v.* Kennett, 54 Mo. 88.

He cannot appoint an attorney-at-law. Glass *v.* Glass, 76 Ala. 368. Nor can he give a warrant of attorney to confess a judgment. Bennett *v.* Davis, *supra*. See also the following cases: Cummings *v.* Powell, 8 Tex. 90; Shropshire *v.* Burns, 46 Ala. 108; Chapin *v.* Shaefer, 49 N. Y. 412; Bozeman *v.* Browning, 31 Ark. 364; Mustard *v.* Wohlford, 15 Gratt. 337.

of a married woman to appoint an agent is co-extensive with her rights to act as a *feme sole*.[1] By the common law a married woman cannot in her right as *feme covert* make a binding contract during coverture (*k*). In order to bind her husband, she must be shown [★ 14] to have authority, ★ express or implied, to act as his agent (*l*). She had the right of a *feme sole* in the following cases: When she had been divorced *à vinculo*, or separated by decree of judicial separation, or when deserted by her husband and in possession of a protection order (*m*), or when the husband had abjured the realm (*n*). She was in a like position when the husband had been transported beyond seas as a convict (*o*). By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman is made capable of contracting as a *feme sole;* and of rendering herself liable to the extent of her separate property on any contract (ss. 1, 2). In equity the separate estate of a married woman is bound by and liable to satisfy a contract entered into by her in reference to her estate, and it will be assumed, when she has no other means of satisfying the contract, that it has been entered into with reference to such estate (*p*). Apparently a separate business may be carried on by a wife while she resides with her husband, unless he takes such a part in the business as to render himself principally liable (*q*). Under this act a married woman may, like a *feme sole*, transfer stock entered or registered in her name, in the manner therein provided (*r*), but the entry is essential (*s*). Again, a mar-

(*k*) Marshall *v.* Rutton, 8 T. R. 545; Lewis *v.* Lee, 3 B. & C. 291; Fairthorne *v.* Blaguire, 6 M. & S. 73.
(*l*) Montague *v.* Benedict, 3 B. & C. 631.
(*m*) 20 & 21 Vict. c. 85; and Ramsden *v.* Brearley, L. R., 10 Q. B. 147.
(*n*) Lean *v.* Schutz, 2 W. Bl. 1199; Lewis *v.* Lee, 3 B. & C. 297.
(*o*) Carrol *v.* Blencow, 4 Esp. 27. (*p*) Picard *v.* Hine, L. R., 5 Ch. 274.
(*q*) Laporte *v.* Costick, 31 L. T., N. S. 434.
(*r*) R. *v.* Carnatic Rail. Co., L. R., 8 Q. B. 299.
(*s*) Howard *v.* Bank of England, L. R., 19 Eq. 295.

[1] In Pennsylvania by "the Married Persons Property Act" of 3rd of June, 1887, § 2 "A married woman shall be capable of entering into and rendering herself liable upon any contract relating to any trade or business in which she may engage * * * in all respects as if she were a *feme sole*," and "A married woman may make, execute, and deliver leases of her property and appoint attorneys to act for her and it shall not be necessary for her husband to be made a party thereto or joined therein."

By this act a married woman in Pennsylvania can contract the same as if she were a *feme sole* and render herself liable to the extent of her separate estate.

In the absence of statutory provision the general rule is that a married woman is incapable of appointing an agent. Story on Agency, § 6. A married woman may authorize her husband to act as her agent with respect to her separate estate. In such case the same incidents attach as to any other agency, and the wife is bound by the acts of her husband the same as any other principal would be bound. Louisville Coffin Co. *v.* Stokes, 78 Ala. 372. See also Lavassar *v.* Washburne, 50 Wis. 200; Griffin *v.* Rausdale, 71 Ind. 440; Coolidge *v.* Smith, 129 Mass. 554; Walker *v.* Carrington, 74 Illi. 446; Manhattan Life Ins. Co. *v.* Smith, 5 N. E. Rep. (Ohio) 417. See Ruchizky *v.* DeHaven, 97 Pa. St. 202.

ried woman who is a *sole trader* in the city of London, independently of her husband, may, by the custom of London, sue and be sued in the city courts, with reference to her dealings as sole trader (*t*).[1] But, as a rule, a married woman cannot be sued as *feme sole*, though she has a separate estate, except for debts contracted before marriage, and for liability to a parish for the maintenance of her husband and of her children (*u*).

By the Conveyancing and Law of Property Act, 1881, s. 41, a married woman, whether an infant or not, is empowered to appoint an attorney by deed for the purpose of executing any deed or doing any other act which she might execute or do herself.

★ *Contracts of aliens.*]—A distinction is made by the [★15] common law between the contracts of alien friends and alien enemies. The contracts of the former were generally valid (*x*), although before 7 & 8 Vict. c. 66, they could not take a lease of a house; nor were agreements to grant them such leases valid (*y*); but the contracts of the latter are by the common law altogether void (*z*), unless such aliens came into this country under a safe conduct, or unless they lived here by the sovereign's licence (*a*). By the Naturalization Act, 1870 (33 Vict. c. 14), it would appear that all aliens are now able to take, acquire, hold and dispose of real and personal property of every description in the same manner in all respect as if they were natural born British subject, and hence enjoy all the rights of contract involved in such rights.

Convicts and outlaws.]—By 33 & 34 Vict. c. 23, s. 1, a convict, that is, one against whom, after the passing of the act, judgment of death or of penal servitude shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales or Ireland, upon any charge of treason or felony, is disabled, while subject to the operation of that act, from bringing any action at law or suit in equity, and from alienating or charging any property, and from making any contract, except during such time as he may be lawfully at large under any licence (*b*). Outlaws, as the name implies, are without the protection of the law; they are *civiliter mortui*, and can appear in court only for the purpose of reversing the outlawry (*c*).

(*t*) Bac. Abr. "Baron and Feme," M.

(*u*) Married Women's Property Act, 1870, ss. 12, 13, 14; Hancocks *v.* Lablache (Mar. 9, 1878), C. P.; see, too, Ord. XVI. r. 8.

(*x*) Co. Litt. 1296; Bac. Abr. "Aliens," D. J.

(*y*) Lapierre *v.* M'Intosh, 9 A. & E. 857.

(*z*) Roll. Abr. "Alien," B.; Brandon *v.* Nesbitt, 6 T. R. 23.

(*a*) Boulton *v.* Dobree, 2 Camp. 162; Wells *v.* Williams, 1. Salk. 46.

(*b*) Sects. 6, 30.

(*c*) *Re* Mander, 6. Q. B. 867, 873; Aldridge *v.* Buller, 2 M. & W. 412.

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[1] A married woman may become a *feme sole* trader in the business of keeping a boarding house. Dial *v.* Neuffer, 3 Rich (S. C.), 78. See also Rouillier *v.* Wernicki, 3 E. D. Smith (N. Y.), 310; Wieman *v.* Anderson, 42 Pa. St. 311.

SECT. 2.—*The Agent.*

Grounds on which a person is incapacitated to act as agent.]—Incapacity to act as an agent proceeds from either natural or legal incompetency, and this latter is generally due to the violation of certain rules prescribed by the law for the guidance of the person [★ 16] who is otherwise competent to act as an agent, or ★ to the nature of the subject-matter of the contract. They are framed for the purpose of preventing anyone in whom a trust or confidence is reposed from placing himself in a position in which he has an opportunity of taking advantage of his employer, or from assuming a position in conflict with his duty (*d*).

All persons of sane mind may act as agents.]—Agents, however, are not required to possess the same qualifications with principals; indeed, it may be laid down as a general rule that all persons of sane mind are capable of becoming agents. Few persons, if any, are excluded from exercising a naked authority to which they are delegated. Hence monks, infants, feme coverts, persons attainted, outlawed, or excommunicated, villains, and aliens, may be agents.[1] The reason given for this distinction between principals and agents is, that the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapacities or disabilities as are involved in infancy and the rest, or to any other person who, by law, may claim any interest of such disabled person after their death (*e*). But infants and feme coverts cannot at common law be attorneys to prosecute suits nor to execute an authority coupled with an interest (*f*). Sect. 1, sub-sect. 2 of the Married Women's Property Act, 1882, does not abolish the rule that a married woman is incapable of filling the office of next friend or guardian *ad litem* (*g*). An infant may exercise a power coupled with an interest where an intention appears that it should be exercisable during minority (*h*).

The conduct of agents in their agency.]—Although few persons are disqualified from becoming agents, the conduct of those who act in that capacity is watched with great jealousy by the law.

(*d*) Rothschild *v.* Brookman, 5 Bligh., N. S. 165; Gillett *v.* Peppercorne, 3 Beav. 78.
(*e*) Bac. Abr. "Authority," B.; Perk. 187; Co. Litt. 52a.
(*f*) Co. Litt. 52a; Hearle *v.* Greenbank, 3 Atk. 695.
(*g*) Thynne *v.* St. Maur; *Re* Duke of Somerset, 34 Ch. D. 465.
(*h*) In *re* Cardross's Settlement, 7 Ch. D. 728.

[1] A married woman may act as agent for her husband. Lang *v.* Waters, 46 Ala. 624, Goodwin *v.* Kelley, 42 Barb. (N. Y.) 194. Measer *v.* Page, 39 Vt. 306. Stall *v.* Meek, 70 Pa. St. 181.

A married woman may also act as agent for a third person and this even without consent of her husband. Her acts as such agent do not impose any legal liability on him. Pullman *v.* The State, 78 Ala. 31.

A husband may act as agent for his wife. Ready *v.* Bragg, 1 Head. (Tenn) 511; Buckley *v.* Wells, 33 N. Y. 518; Sims *v.* Smith, 99 Ind. 469; Manhatten Life Ins. Co. *v.* Smith, 5 N. E. Rep. (Ohio) 417.

Thus no agent will ever be allowed to take upon himself incompatible duties and characters, or to act in a transaction where he has an adverse interest or employment (*i*).[1] Manifestly, if a person employed as agent on account of his skill is to have in the very same transaction an interest directly oppposite to that of his employer, the relation between the parties ★ must inevitably [★ 17] lead to continued disappointment, if not to fraud. Hence, where a stockbroker employed to buy some canal shares made a pretended purchase of such shares from his own trustee, the court held the transaction void on grounds of public policy (*k*); nor in such a case will a remedy be denied because several years have elapsed since the transaction, or because the price was a fair one (*l*).

Principles regulating their conduct when employed to buy or sell.]—Hence it is that two principles with relation to the doctrine of principal and agent have been recognized from the earliest times. One is, that an an agent employed to purchase cannot secretly buy his own goods for his principal;[2] neither can an agent employed to sell, himself purchase secretly the goods of the principal.[3] If he should do so, and thereby make a profit, his principal may either repudiate the transaction altogether, or, adopting it, may claim for himself the benefit made by his agent (*m*). Courts of equity do not, however, prevent an agent dealing with his principal. They only require, in the words of Lord St. Leonards, "that he should

(*i*) Dunne *v.* English, L. R., 18 Eq. 524.
(*k*) Gillett *v.* Peppercorne, 3 Beav. 78. (*l*) *Ibid.*
(*m*) Kimber *v.* Barber, L. R., 8 Ch. 56.

[1] Hinckley *v.* Arey, 27 Me. 362. Meyers *v.* Hanchett, 39 Wis. 419. In Tewksbury *et. al v.* Spruance *et. al;* 75 Illi. 188.

The Court said: "An agent or broker employed to purchase for his principal cannot become the seller without notice to the principal."

If appellees, as commission merchants, were employed by appellants to "go upon the market and buy for them a certain quantity of wheat for cash, this would not authorize appellees to turn over to appellants wheat held by them, even if they charged no more than the market price, unless the fact was disclosed to the principal. An agent is bound to act within the scope of his authority and when he has a duty to discharge as agent, his own interest must not come in conflict with the duty he owes his principal."

A stock broker employed by a customer to purchase stock cannot buy his own stock; and this is not affected by the fact that he acted in good faith and obtained the stock for his customer at a less price than if he had gone into the open market. Taussig *v.* Hart, 58 N. Y. 525.

When a person is standing in the position of an agent to both parties he cannot execute a morgage as the attorney of one for the benefit of the other. Such contract is not void but voidable and can be set aside by the principal, provided he comes into court, within a reasonable time.

To repudiate such a transaction it is not necessary that there should be actual fraud. Greenwood *v.* Spring, 54 Barb. 375. There are cases in which an agent may act for both parties and receive compensation from both for his services. Alexander *v.* N. W. University, 37 Ind. 466; Story on Agency, § 211, note.

[2] Taussig *v.* Hart, 58 N. Y. 525.
[3] Walker *v.* Palmer, 24 Ala. 358.

deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property" (*n*). This subject is one that more properly belongs to an examination of the duties and liabilities of agents (*o*).

An agent cannot be employed to do an illegal act.]—It is well established that no court of law or equity will enforce a contract which is either expressly or impliedly prohibited by the common or statute law (*p*).[1] Everything *contra bonos mores* is prohibited by the common law (*q*). Since no one can delegate except what he may do in his own right, clearly no agent can be appointed to do a prohibited act (*r*). Hence, where there was a dispute between the plaintiff and one of the defendants about a weir situate on the plaintiff's land, and the other defendant was charged with intending to enter forcibly on the land and destroy the weir, the Master of the Rolls held that the last-mentioned defendant could not sustain a demurrer to a bill for an injunction, on the ground that he had no [★ 18] interest in the ★subject-matter of the dispute, and was a mere agent acting on the orders of the principal defendant (*s*). But the revenue laws of another country are not protected (*t*). It has long been held that there are some things so inseparably annexed to the person of a man that he cannot do them by another;[2] for instance, the doing of homage and fealty (*u*). Hence it is said that a lord may beat his villain for cause, or without cause, and the villain shall not have any remedy; but if the lord command another to beat his villain without cause, he shall have an action of battery against him who beats him in such a case. So, if the lord distrained the cattle of his tenant, the tenant, for the respect and duty which belonged to the lord, could not have trespass *vi et armis* against him; but if the lord commanded his servant to distrain

(*n*) Murphy *v.* O'Shea, 2 J. & Lat. 422. (*o*) *Infra.*
(*p*) See *Re* Cork & Youghal Rail. Co., L. R., 4 Ch. 748, 762.
(*q*) Holman *v.* Johnson, Cowp. 343; Allen *v.* Rescons, 2 Lev. 174.
(*r*) Heugh *v.* Abergavenny (Earl), 23 W. R. 40.
(*s*) Heugh *v.* Abergavenny (Earl), 23 W. R. 40.
(*t*) Cowp. 343; Planche *v.* Fletcher, 1 Doug. 251.
(*u*) Combe's case, 9 Co. 766; and see *Ex parte* Agra, &c. Bank, L. R., 6 Ch. 206.

[1] Where one party to a contract agrees to employ a number of secret agents for the purpose of having a particular law passed by the Legislature of a State, and the other party promises to pay a large sum of money in case the law is passed, such contract is void on the ground of public policy. Marshall *v.* Baltimore and Ohio R. R., 16 How. (U. S.) 314.

[2] Connor *v.* Parker, 114 Mass. 331; Bocock *v.* Pavey, 8 Ohio St. 270. An agent with power to issue policies of insurance, the signing and delivering of which involve passing upon the character of risks, cannot without express authority from principal, delegate this power to another. Lynn *v.* Burgoyne, 13 B. Monroe, 400; McClure *v.* Ins. Co., 4 Mo. Ap. 148. A general agent of the owner of buildings, having authority, in his discretion to employ an engineer cannot delegate this power. Crozier *v.* Reins, 4 Illi. App. 564. It may be stated as a general rule that where there is a particular personal trust or confidence reposed in the agent, he cannot delegate his authority. Story on Agency § 14, &c.

where nothing was behind, the tenant had an action of trespass *vi et armis* against the bailiff or servant (*x*).

Lord Tenterden's Act.]—By sect. 6, "no action shall be brought whereby to charge any person upon" any representation concerning the character "of any other person, to the intent that such other person may obtain credit, money, or goods," unless such representation be made in writing signed by the party to be charged therewith. The signature of an agent will not satisfy this section (*y*).

Incompetency arising from the relation of the parties—Co-contractors.]—The last ground of incompetency to be noticed likewise arises from the relation of the parties. One of the parties to a contract cannot be the agent of the other for the purpose of signing the contract (*z*).

Appointment of trustee as estate agent.]—The trustee of an estate, after renunciation of the trust, may act as agent in its management (*a*). A deed of disclaimer is the best evidence of renunciation of a trust, but the conduct of the party desirous of renouncing a trust may amount to a disclaimer (*b*). There are many reasons, however, why such a trustee should be careful in taking upon himself the duties of an agent.

Agent to levy distress.]—A person who is appointed to levy a distress is required in some cases to have an authority other than ★ that derived from his employer. Thus, the Statute of [★ 19] Westminster II. (13 Edw. 1, st. 1, c. 37), enacts that no distress shall be taken except by bailiffs "sworn and known." This provision does not apply to distresses taken for rent in arrear (*c*). In the case of holdings subject to the Agricultural Holdings Act, 1883, "no person shall act as a bailiff to levy any distress," unless authorized to act as a bailiff by a certificate in writing under the hand of a judge of a county court (sect. 61).

Unauthorized acts.]—An agent may be competent and authorized to perform one set of acts, and yet be without authority to do the particular act which he has undertaken. Thus a stewart or land agent has no implied authority to enter into contracts for leases. In *Collen* v. *Gardner* (*d*) (1856), Lord Romilly, M. R., held that the fact of a landlord employing a steward to let and manage his property did not necessarily involve in it a right to conclude agreements with tenants. This class of cases will be dealt with in the chapter (Book II., Ch. 3) relating to the implied authority of agents.

(*x*) Coombe's case, *supra*.
(*y*) Williams *v.* Mason, 28 L. T. 232; 21 W. R. 386; and see Hyde *v.* Johnson, 2 B. N. C. 186; and Toms *v.* Cumming, 7 M. & G. 88.
(*z*) Wright *v.* Dannah, 2 Camp. 203.
(*a*) Stacey *v.* Elph, 1 M. & K. 195.
(*b*) *Ibid.*
(*c*) Begbie *v.* Hayne, 2 Bing. N. C. 124; Child *v.* Chamberlain, 6 C. & P. 213.
(*d*) Collen *v.* Gardner, 21 Beav. 540; Ridgway *v.* Wharton, 6 H. L. Ca. 238.

[★20]

★CHAPTER III.

THE APPOINTMENT OF AGENTS.

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The appointment may be express or implied from the principal's conduct or acquiescence.]—It is a rule of law that no one can become the agent of another except by the will of the principal (*a*); but this will may be either expressed clearly or it may be implied from particular circumstances.[1] It may be expressed in writing or

(*a*) Pole *v.* Leask, 8 L. T. Rep. 645; 33 L. J., Ch. 155.

[1] It may be implied from circumstances, as where it was held that a subsequent ratification of an act done by another, though without precedent authority, created the relation of principal and agent; and after such ratification the principal is bound the same as though he had authorized the act to be done. Such ratification can only be made with full knowledge of all the circumstances of the case. Gulick *v.* Grover, 33 N. J. L. 463. Where the facts are admitted, the question whether an agent has authority to bind his principal, whether such authority is sought to be sustained by a previous authorization or a subsequent ratification, is a question of law for the court. Gulick *v.* Grover, *supra*: Bank *v.* Warren, 15 N. Y. 577; Kountz *v.* Price, 40 Miss. 341; Sweetzer *v.* French, 2 Cush. Mass. 309; Bank *v.* Brooking, 2 Litt. Ky. 41.

The question whether there is sufficient evidence from which an agency may be inferred is one for the jury. Lamb *v.* Irwin, 69 Pa. St. 436; Whitman *v.* Bolling, 47 Ga. 125; N. E. Mortgage & Security Co. *v.* Addison, 15 Neb. 335.

The fact of agency cannot be established by evidence of the acts of the alleged agent in the absence of evidence showing the principal's knowledge of such acts, or that he had ratified them; but, where the acts are of such character and so continuous, as to justify a reasonable inference that the principal had knowledge of them and would have objected to them if unauthorized, the acts themselves are competent evidence of the agency. Reynold *v.* Collins, 78 Ala. 94.

orally; it may be implied from the fact that a person is placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for another (*b*). In the earlier text books it has been said that an authority to act as attorney or agent should be conferred by deed or instrument under seal, so that there might be no doubt respecting the authority or its extent (*c*). Clearly such a rule has now no efficiency. So true is this that Mr. Justice Story is fully justified when he says the general rule may be laid down the other way; and an agent or attorney may ordinarily be appointed by parol in the broad sense of that ★ term at the common law, that is, by a declaration in [★ 21] writing not under seal, or by acts and implication (*d*).[1] The most usual mode of appointment is by an unwritten request, or by implication from the recognition of the principal, or from his acquiescence in the acts of the agent. Cases of this description arising from the grant of an agency by an unwritten or verbal request, or by implication, are very familiar in all the common business of life and the common departments of trade. Thus, the appointment by which the relation of master and servant is created, and the extent of the authority conferred on the latter, are ordinarily known and

(*b*) *Ibid.*

(*c*) Bac. Abridg. "Authority," A.; Co. Litt. 52a; Com. Dig. "Attorney," c. 5.

(*d*) Story on Agency, s. 47.

To prove that one is an agent of a corporation it is not necessary to produce the record of his appointment, a ratification of his acts will be sufficient. The same as in case of a natural person. Reynold *v.* Collins, *supra.* The mere declaration of one claiming to be an agent will not be sufficient to constitute the relation, when such declaration is not made in the hearing of the principal, and has not been assented to by him. Proctor *v.* Tows, 115 Illl. 138.

The question of agency is one of fact, to which a witness may testify when he has knowledge of its existence: it cannot be proved by general reputation. 76 Ala. 572.

In the absence of an appointment, ratification, or of an estoppel, there is no sufficient evidence of agency. Alexander *v.* Rollins, 14 Mo. Ap. 108, 84 Mo. 657. As far as third persons are concerned, it is immaterial to the question of agency, whether one acts by the direction and request, or merely by permission of the principal. Fay *v.* Richmond, 43 Vt. 25.

[1] The appointment as well as the authority of the agent of a corporation may be implied from the adoption of his acts by the corporation or by its directors. Eq. Gas Light Company *v.* Baltimore Coal Tar Co., 2 Central Rep. (Md.) 863.

A single act of an assumed agent, and a recognition of his authority by the principal, if sufficiently unequivocal, positive, and comprehensive in their character, may be sufficient to prove agency to do other similar acts. Wilcox *v.* Milwaukee & St. Paul R. R., 24 Minn. 269.

Where one accepts the benefits of a proposition for a sale made by and through another, he constitutes the latter his agent. Milligan *v.* Davis, 49 Iowa, 126. If A. pays taxes on land belonging to B., and B. subsequently compensates him therefor, the presumption is that A. is B.'s agent in making it. Paris *v.* Lewis, 85 Illi. 597. See also Hull *v.* Jones, 69 Mo. 587; Lovell *v.* Williams, 125 Mass. 439; Fouch *v.* Wilson, 59 Ind. 93; Whelan *v.* Reilly, 61 Mo. 565; Greene *v.* Hinckley, 52 Ia. 633.

ascertained only by implication from the recognition or conduct or acquiescence of the master (*e*).

Effect of acceptance of delivery order.]—When a wharfinger, warehouseman, or bailee of goods has accepted a delivery order from a purchaser, he becomes a bailee of the person mentioned in the order (*f*).

Circumstances upon which depends the mode in which the agent should be appointed.]—Such, then, are the several modes in which an agent may be appointed. But since all modes of express appointment are not equally allowable under all circumstances and in all agencies, it remains to be considered what modes of appointment are appropriate in certain cases. And here it may be laid down generally that the mode in which an agent should be appointed depends upon (1) the form in which his authority is to be executed, and (2) the corporate or other character of the body from which his authority is derived.

Cases where the authority is to be executed by deed.]—As to the first point, the long-established rule is that where an agent is to execute his authority by deed, it is absolutely requisite that the authority to do so should be under seal (*g*).[1] This rule does not apply to the signing of a memorandum of association by an agent. He may receive his instructions by telegram (*h*). Generally

(*e*) *Ibid.*, ss. 54, 55.

(*f*) Bryans *v.* Nix, 4 M. & W. 791.

(*g*) Co. Litt. 486; White *v.* Cuyler, 6 T. R. 176; Berkeley *v.* Hardy, 5 B. & C. 355.

(*h*) Callan's case, 32 Ch. Div. 337, 55 L. J. Ch. 540; 54 L. T. 912.

[1] The authority to an agent to execute a writing under seal, must be given under seal. But where a seal is not necessary to the contract, if the agent had power to execute it, the principal will be bound, even though the agent attached a seal. The seal will have no effect. Wagoner *v.* Watts, 44 N. J. L. 126; Adams *v.* Powers, 52 Miss. 828. An agent without authority under seal, may, in the presence and with the consent of his principal, sign his principal's name to a writing required to be under seal. The Court said, "That the authority was delegated for only one object, was not to be exercised out of the interested party's presence, lasted the space of time required to write a name and expires when the last letter of the principal's name fell from the agent's pen. In such a case, the act itself is the act of the principal, not of the agent. Meyer *v.* King, 29 La. An. 570. Authority must be under seal: Preston *v.* Hull, 23 Grattan, (Va.) 600; Gordon *v.* Bulkeley, 14 S. & R. (Pa.) 331; Harshaw *v.* McKesson, 65 N. Car. 688; Rowe *v.* Ware, 30 Ga. 278; Emerson *v.* Prov. Hat Co., 12 Mass. 237; Wells *v.* Evans, 20 Wend. 251; Wheeler *v.* Nevins, 34 Me. 54; Allis *v.* Goldsmith, 22 Minn. 123.

A surety who intrusts a bond to his principal to be filled up and delivered by him to the obligee, is bound by anything which the principal may insert in the bond, though contrary to his orders, provided the obligee has no notice of such breach of instructions. White *v.* Duggan, 140 Mass. 18,

For other instances of sealed instruments, delivered to agent, with blanks to be filled in by him, see Stahl *v.* Berger, 10 S. & R. (Pa.) 170; Wooley *v.* Constant, 4 Johns. (N. Y.) 154; Vliet *v.* Camp, 13 Wis. 198.

A contract for the sale of land, signed and sealed by the agent of the vendor is binding though the agent's authority to make the contract was not under seal. Baum *v.* Dubois, 43 Pa. 265, or even in writing, Riley *v.* Minor, 29 Mo. 439; Dickerman *v.* Ashton, 21 Minn. 538.

speaking, the courts will not restrict the common law rule, *Qui facit per alium facit per se*, unless a statute makes a personal signature indispensable (*i*). By 8 & 9 Vict. c. 106, s. 3, a deed is rendered necessary in certain conveyances. These conveyances ★ are, a feoffment (other than a feoffment under custom [★ 22] by an infant); a partition or an exchange of hereditaments not being copyhold; a lease required by law to be in writing before this act; an assignment of a chattel interest, not being copyhold, in any hereditament; and a surrender in writing of an interest in any hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing. Referring to the authority of an agent to sign a contract under the Statute of Frauds (29 Car. 2, c. 3, ss. 1, 2, 3), it is said by one text writer that for the purpose of creating a freehold or leasehold interest (other than leases under three years) in tenements, or of surrendering the same (except copyhold interests), the authority of the agent must be in writing (*k*). The logical consequence of 8 & 9 Vict. c. 106, would seem to be that a deed is necessary for the purpose of authorizing another to make any of the above-mentioned conveyances. A distinction is drawn between an authority to contract for a lease or interest in land, and an authority to sign the instrument by which the interest passes. In the former case the authority may be conferred orally (*l*). A contract to obtain an assignment of a lease is within sect. 4 of the Statute of Frauds, and must be in writing (*m*). Generally, a partner must be expressly authorized by deed to bind his co-partners by deed (*n*).[1] Another rule, proceeding from similar principles, is that an authority to release a contract entered into by deed must be given by deed (*o*): but an agent does not require a written authority for the purpose of contracting on behalf of his principal under the 4th section or the 17th section of the Statute of Frauds (*p*).

Cases where the principal is a body corporate.]—Secondly, at common law, a body corporate could not make a binding contract except by deed under its common seal. A body corporate, it was said, could not act or speak, only by its common seal, so that the common seal was the hand and mouth of such a corporation (*q*).

(*i*) See Reg. *v.* Justices of Kent, L. R. 8 Q. B. 305, in which Hyde *v.* Johnson, 2 Bing. N. C. 776, is discussed.

(*k*) Chitty on Contracts, p. 192.

(*l*) Coles *v.* Trecothick, 9 Ves. 250; Mortlock *v.* Buller, 10 *ib.* 311; 5 Vin. Abr. 524; Elsee *v.* Barnard, 28 Beav. 228; Heard *v.* Pilley, L. R. 4 Ch. 549.

(*m*) Horsey *v.* Graham, 39 L. J. C. P. 58.

(*n*) Harrison *v.* Jackson, 7 T. R. 207. (*o*) Bac. Abr. "Release," A. 1, 323.

(*p*) Coles *v.* Trecothick, 9 Ves. 234; Graham *v.* Musson, 7 Scott, 769.

(*q*) Rex *v.* Bigg, 3 P. Wms. 419; Com. Dig. Franchise, F. 13.

[1] But the act of one partner in executing a deed in the name of the firm and without authority can be ratified by parol, either express or implied. Holbrook *v.* Chamberlain, 116 Mass. 161; Bond *v.* Aitkin, 6 W. & S. (Pa.) 165; Drumright *v.* Philpot, 16 Ga. 424.

This rule prevailed both in equity and at law (*r*); nor could the [★ 23] want of such a deed be cured by a mere resolution of ★ the corporation members (*s*). The strictness of the common law rule appears to have admitted of exceptions at an early period; for although in *Rex* v. *Bigg*, which was decided in 1717, it is stated that a corporation aggregate could not without deed enter into a contract, or empower another to do so, it is granted that a corporation may, for convenience's sake, act in ordinary matters without deed. For instance, it could retain a cook, servant, or butler (*t*), or appoint a bailiff to take a distress (*u*), or order a servant to cut trees, in the vacancy of the headship (*x*).[1]

Essentials of the contracts of corporate bodies.] — It may be stated generally that in order to be binding the contract of a body corporate must now be either (1) under the common seal, or (2), if parol, allowed at law or in equity to be so entered into, or (3) entered into in the manner and form prescribed by the statute, if any, which empowers the corporation to contract in some other mode (*y*); and (4) in *Ecclesiastical Commissioners* v. *Merral* (*z*), Kelly, C. B., was of opinion that, when a person so contracts with a corporation by parol that the contract is enforceable in equity against them, the other party is bound at law by any stipulation by him made in consideration of the liability so imposed on them. This view, which is supported by authority (*a*), cannot be said to conflict with the authorities against a distinction being made between executed and executory contracts—a distinction now exploded so far as concerns the validity of the acts of a corporation (*b*). The parol contracts of a body corporate will, if they have been acted upon, be enforced in a court of equity both in favour of and against a corporation (*c*).

Exceptions to the rule that such contracts should be under seal: (1) *Statutory;* (2) *Equitable;* (3) *On ground of convenience*—

(*r*) Winne *v.* Bampton, 3 Atk. 473.

(*s*) Mayor of Ludlow *v.* Charlton, 6 M. & W. 815; Carter *v.* Dean of Ely, 7 Sim. 211.

(*t*) 2 Saund. 305. (*u*) 3 Lev. 107. (*x*) Yearb. Edw. 4.

(*y*) See 1 Lindley on Partnership, 370. (*z*) L. R. 4 Ex. 162.

(*a*) Marshall *v.* Corporation of Queenborough, 4 Sim. & St. 520; Doe *v.* Taniere, 12 Q. B. 998, 1013.

(*b*) Paine *v.* The Strand Union, 8 Q. B. 326; Cope *v.* Thames Haven Co., 3 Ex. 841.

(*c*) Marshall *v.* Queenborough, *supra*; Stevens Hospital *v.* Dyas, 15 Ir. Ch. 405, 420.

[1] Osborn *v.* Bank of U. S., 9 Wheat. 738; Bank U. S. *v.* Dandridge, 12 Wheat. 64; Bank *v.* Patterson, 7 Cranch. 299; Randall *v.* Van Vetchen, 19 Johns. (N. Y.) 60, Dent *v.* N. A. Steam Co., 49 N. Y. 390; Peterson *v.* Mayor of New York, 17 N. Y. 449; Adams Ex. Co. *v.* Schlessinger, 75 Pa. 346; Kelsey *v.* National Bank, 69 Pa. 426; Stanwood *v.* Laughlin, 73 Me. 112; Darst *v.* Gale, 83 Illi. 136; Swazy *v.* Union Manf'g Co., 42 Conn. 556; Story on Agency, § 53. note. Municipal Corporations same as others. Painter *v.* Worcester, 123 Mass. 311; Barnes *v.* Dist. Columbia, 91 U. S. 540; School District *v.* Insurance Co., 62 Me. 330.

Municipal and trading corporations.]—Leaving for the present the statutory and equitable exceptions to the common law rule, which requires the contracts of a body corporate to be under seal, ★ it will be found that the remaining exceptions may, to [★ 24] use the words of Lord Denman, be referred to convenience amounting almost to necessity (*d*). Hence the exceptions recognized almost simultaneously with the framing of the rule (*e*). This class of exceptions is recognized more fully in trading than in municipal corporations, for, whilst a trading corporation may make all such contracts as are of ordinary occurrence in their trade without the formality of a seal (*f*), a municipal corporation may make a binding parol contract apparently only where the act is required for convenience, or where either the acts are trivial in their nature and of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd, or such that an overruling necessity requires them to be done at once (*g*). Thus, in determining upon the validity of parol contracts made by corporations, where there is no performance and no statutory provision, in the one case the test is the convenience and necessity of the act, in the other the conformity of the act with the ordinary transactions of the trading body. And it would seem that the magnitude or insignificance of the contract of a trading body is of no moment in deciding upon the validity of such contract (*h*).

In *Wells* v. *Kingston-upon-Hull* (*i*), which was decided in 1875, the principle laid down in *Church* v. *Imperial Gaslight Co.* (*k*), with reference to the exceptions to the rule that a municipal corporation can only contract under seal, was considered and adopted. The defendants, a municipal corporation, were possessed of a dock, which was let to parties requiring the same for the repairs of vessels. The plaintiff had paid to the borough treasurer the entrance money for his ship, which was accordingly entered in the turn book. When the turn of the vessel came, another vessel was admitted in her stead. In an action for breach of contract, the defendants contended that the contract ought to have been under the seal of the corporation. A rule *nisi* was accordingly granted, but after argument discharged.

★ Lord Coleridge said, "There is no doubt a distinction [★ 25] between trading and other corporations, but I can find no authority for the position that a municipal corporation, when engaged in any trading transaction, is to have the same immunity as a corporation created under an Act of Parliament for the very purpose of trading.

(*d*) Church *v.* Imperial Gaslight Co., 6 A. & E. 846.
(*e*) *Supra.*
(*f*) South of Ireland Colliery Co. *v.* Waddle, L. R., 3 C. P. 463.
(*g*) *Per* Alderson, B., Diggle *v.* London & Blackwall Rail. Co., 5 Ex. 442.
(*h*) *Per* Bovill, C. J., South of Ireland Colliery Co. *v.* Waddle, L. R., 3 C. P. 463.
(*i*) L. R., 10 C. P. 402; 44 L. J., C. P 257; 32 L. T. 615.
(*k*) *Supra.*

I treat this case as that of a municipal corporation, and one to which the exception in favour of trading corporations is inapplicable. But on reference to the authorities it will be seen that from the very earliest times certain exceptions to the rule that required a seal were established. These are very conveniently summarized in the judgment in *Church* v. *Imperial Gaslight Co.* (*l*). The law, as there laid down, is cited by the Court of Exchequer with approval in the case of *Mayor of Ludlow* v. *Charlton* (*m*), a case in which the court took a view adverse to the right of persons contracting with corporations without a seal. The principle laid down is that, wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. It appears to me that this case comes well within the description there given of the kind of the kind of acts which may be done by a corporation without their seal."

In a previous case, *Austin* v. *The Guardians of Bethnal Green* (*n*), the same court, whilst recognizing the exceptions to the rule, decided that the contract for the engagement of a clerk to the master of a warehouse by a board of guardians, must, in order to bind the guardians be under their seal, be under their seal. In a note to this case, the reporters refer to *Smart* v. *Guardians of West Ham Union* (*o*), with respect to the distinction between the question whether there has been a due appointment to an office for some purposes and the question of liability by way of contract.

Contracts by urban authorities—Public Health Act, 1875, s. 1.]—The house of Lords dealt, in 1883, in *Young* v. *Mayor of Leamington* (*p*), with the mode in which contracts should be made by corporations so as to be binding. The respondents, by a resolution [★ 26] not under seal, authorized their engineer and surveyor ★ to enter into a contract for the completion of a contract to supply water. The appellant was so employed, and finished the work. He claimed a balance of between 6,000*l.* and 7,000*l.* for his services and labour. The claim was resisted on several grounds, and, amongst others, on the ground that the contract was not under seal. The Queen's Bench Division and the Court of Appeal (*q*) held that the plaintiff could not recover. The defendants had the benefit of the appellant's work, labour, and materials. But sect. 1 of the Public Health Act, 1875, enacts that "every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority." The House of Lords, in affirming the judgments of the Courts below,

(*l*) 6 A. & E. 861.
(*m*) 6 M. & W. 815, 822.
(*n*) L. R., 9 C. P. 91.
(*o*) 10 Ex. 867; 11 Ex. 867.
(*p*) 8 App. Ca. 517.
(*q*) 8 Q. B. D. 579.

held that the provision was obligatory and not merely directory (*r*), and applies to an executed contract. Brett, L. J., in the Court of Appeal, distinguished between the acts of a municipal corporation as such, and those it does as a board of health.

Cases where the authority is to do something ultra vires, e. g., *to accept bills.*]—An agent may be appointed under the seal of the corporation, yet if the object for which he is appointed is entirely unconnected with the purposes and beyond the power of the corporation, the corporation will not be bound by his acts. Thus, it is not competent to a company incorporated in the usual way for the formation and working of a railway, to draw, accept, or indorse bills of exchange, and it is immaterial that the acceptance was given by order of the directors, and under the common seal of the company (*s*). Upon this point the rule of law is thus stated by a learned author (*t*):—"However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it even held that the Bank of England might, without deed, appoint an agent for such purposes. But a corporation will not have there extraordinary powers, unless the nature of the business in which it is engaged raises a necessary implication of their existence." This statement ★ of the law was cited with approval in the [★ 27] above case by Montague Smith, J. The general rule is, that corporations have at common law no power to appoint an agent to bind them by a bill of exchange or promissory note.[1] This rule, however, is subject to the following exceptions:—

(a) In the case of the Bank of England (*u*);

(b) When the company has express authority (*x*).

Summary.]—An agent, then, may be appointed by writing, by word of mouth, or the appointment may be implied from the conduct of the principal without evidence of any express authority.[2] And here it may be laid down generally that when one has so acted as from his conduct to lead another to believe that he has appointed

(*r*) See Hunt *v.* Wimbledon Local Board, 4 C. P. D. 48.
(*s*) Bateman *v.* The Mid-Wales Rail. Co., L. R., 1 C. P. 499.
(*t*) Smith, Merc. Law (7th ed.), 105, 106.
(*u*) Bateman *v.* Mid-Wales Rail. Co., *supra.*
(*x*) Slark *v.* Highgate Archway Co., 5 Taunt. 792.

[1] Unless an agent of a corporation is expressly authorized by the instrument by which he is appointed to make and endorse promissory notes, general words, at the conclusion of such instrument giving him power "to do all other acts and things for and on behalf of the said company that he may deem proper to further and protect its interests," will not have such effect. Lawrence *v.* Gebhard, 41 Barb. 575.

[2] The fact of agency cannot be proved by the declarations of the agent or by acts done by him without the knowledge or authority of the principal. Central Penna. &c. Co. *v.* Thompson, 112 Pa. St. 118.

some one to act as his agent, and knows that that other person is about to act in that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no express agency existed (*y*).[1] The illustrations of this principle belong more properly to an examination of the authority of agents.

Compulsory pilots.]—A pilot compulsorily taken on board a vessel does not become the servant of the owners so as to make them liable for a collision caused by his negligence, even at a place where pilotage is not compulsory (*z*). As to the non-liability of the master or owner for damage due to the negligence or incapacity of a qualified pilot within a district where the employment of a pilot is compulsory, see *The Hector* (*a*); *The Halley* (*b*); *The Mary* (*c*); *The Ocean Wave* (*d*); *The Iona* (*e*).

Auctioneers.]—An auctioneer is agent for both purchaser and vendor at a public sale (*f*), but not at a private sale. There he is agent for the vendor only (*g*).

Solicitor and client.]—Lastly, it may be noted that although it is the usual practice, when a country solicitor has been retained, to substitute the name of the London agents for that of the country [★ 28] solicitor, that does not make the former the solicitor of ★ the party who gave the retainer to the country solicitor, though the practice is a perfectly reasonable one as between the solicitors themselves (*h*).

Injunction to restrain solicitor from acting on retainer which would lead to breach of trust.]—There are certain cases under this head which are of especial interest to solicitors.[2] Thus, a solicitor will be restrained by injunction from acting for the party opposed to his former client, if by so acting he would be acting contrary to his duty (*i*). "The principle of *Cholmondeley* v. *Clinton*, as I un-

(*y*) Pole *v.* Leask, 28 Beav. 562; 8 L. T., N. S, 645; 33 L. J., Ch. 155.
(*z*) Gen. S. Nav. Co. *v.* British, &c. S. Nav. Co., L. R., 3 Ex. 330; *ib.*, 4 Ex. 238. See The Stettin, B. & L. 199; and The Lion, L. R., 2 P. C. 525.
(*a*) 8 P. & D. 218.
(*b*) L. R., 2 P. C. 193.
(*c*) 5 P. Div. 14.
(*d*) L. R., 3 P. C. 205.
(*e*) L. R., 1 P. C. 426, explained in Clyde Nav. Co. *v.* Barclay, 1 App. Ca. 790.
(*f*) Emmerson *v.* Healis, 2 Taunt. 38. See Kenworthy *v.* Schofield, 2 B. & C. 945; Durrell *v.* Evans, 1 H. & C. 174; 31 L. J., Ex. 337.
(*g*) Mews *v.* Carr, 1 H. & N. 484; 26 L. J., Ex. 39.
(*h*) Wray *v.* Kemp, 26 Ch. Div. 169.
(*i*) Cholmondeley *v.* Clinton, 19 Ves. 261.

[1] Where an insurance company executes and delivers to one, not an agent of the company a policy of insurance containing an acknowledgement of the payment of the premium, it thus makes him the agent of the company to accept from the assured this particular premium and to deliver the policy. It is, therefore, no defence to an action on the policy that the company never received the premium, if the assured paid it to the agent who delivered the policy. The Lebanon, &c. Ins. Co. *v.* Erb. 112 Pa. St. 149.

[2] The People *v.* Spencer, 61 Cal. 128. An attorney-at-law cannot act on both sides professionally. Herick *v.* Calby, 30 How. Pr. (N. Y.) 208.

derstand it," said Sir William McMahon (*f*), "is to render it impracticable for a solicitor to accept of a new and inconsistent engagement which will almost inevitably lead to the violation of his duty. The duty of a solicitor must be violated if the case of one party in a cause is conducted by the person acquainted confidentially with all the weaker parts and special circumstances of the title or case of his opponent." On this principal, the solicitor of a deceased client has been restrained from acting as solicitor for a creditor of the estate (*g*). Hall, V.-C., held, in *Little* v. *Kingswood, & Co.* (*h*), that the jurisdiction of the court to restrain a solicitor who has acted in one proceeding from acting in a subsequent proceeding for the party opposed to his former client, is not confined to the case where the solicitor has discharged himself, but extends to the case where he has been discharged by the client. His lordship suggested that the true test to be applied in such cases is to consider whether the second proceeding so flows out of, or is connected with, the first, as that the solicitor must be presumed to be in possession of information bearing upon the matter in dispute.

The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another. The jurisdiction will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction, in reference to which the injunction is sought, so flows out of, or is connected ★ with, that in which the solicitor [★ 29] was formally retained that the same matter of dispute may probably arise (*i*).

Penalties imposed on unqualified practitioners.]— Unqualified persons may not be appointed to act as solicitors. Questions not unfrequently arise as to whether a person has been acting as a solicitor so as to render himself liable to the penalties imposed by 6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 127. An unqualified person who acts as solicitor commits an offence against 6 & 7 Vict. c. 73, s. 2, though he acts in the name and with the consent of a duly qualified solicitor (*k*).

The difficulty in these cases is to determine whether the evidence justifies the conclusion that the person against whom proceedings are taken has been acting as a solicitor. In *Dockins* v. *Vickery, Re Symons* (*l*), an accountant named Symons was instructed to collect a debt. Failing to recover the money, he issued a writ which purported to be issued by one Smale, a solicitor, but it was not signed

(*f*) In Hutchins *v.* Hutchins, 1 Hogan's Rep. 315.
(*g*) Biggs *v.* Head, Sausse & Scully's Rep. 335.
(*h*) 20 Ch. Div. 733; 51 L. J., Ch. 498.
(*i*) Little *v.* Kingswood Collieries Co., 20 Ch. Div. 733, per Hall, V.-C.
(*k*) Abercrombie *v.* Jordan, *In re* Hunt, 8 Q. B. Div. 187.
(*l*) 46 L. T. 139.

by or on behalf of a solicitor, as required by Ord. V., r. 7. The address of Symons was given upon the writ as the address for service. A summons was taken out to stay proceedings on the ground that Ord. V., r. 7 had not been complied with. Symons thereupon telegraphed to Smale asking for a reply that the writ was issued with his authority and privity. Smale being under the impression that Symons was clerk to a solicitor who had acted as Smale's agent, replied in the affirmative. As a fact, Symons was not in that employment, though he had been. The court came to the conclusion that the facts showed that Symons was getting up litigation to serve Smale, but that there was no evidence that he was acting as a solicitor.

In a subsequent case, *The Law Society* v. *Waterlow Brothers and Layton* (*m*), law stationers, not qualified as solicitors or proctors, were accustomed, upon the instruction and in the names of London or country solicitors, to take to the registry of the Probate Division original wills and the engrossments, with the proper affidavits, and if these were in order, to fetch away the probate. If any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor [★ 30] and client were made by the solicitors, ★ and the stationers charged the solicitors for their clerk's time only. Upon those facts, the House of Lords, affirming the decision of the Court of Appeal (*m*), which had reversed the decision of Grove, J., held that the stationers had not acted as solicitors or proctors.

Consequences of employing uncertified solicitor.] — The consequences of employing an uncertified practitioner affect not only the person so practicing, but also the person employing him. Thus, by force of the Attorneys and Solicitors Act, 1874, s. 12, the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs or disbursements from the party otherwise liable (*n*).

(*m*) 8 App. Ca. 407.
(*m*) 9 Q. B. Div. 1.
(*n*) Fowler *v.* Monmouthshire Rail. & Canal Co., 4 Q. B. D. 334.

★CHAPTER IV. [★31]

JOINT PRINCIPALS.

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The right to appoint may be in one or many.]—The power of authorizing another to do a certain act or to ratify an unauthorized assumption of authority may be vested either in a single individual or in a number of individuals. It may be vested in a single individual in either of two cases; and these are where no other than that person can act as principal, and where he, in common with others, exercises a power of appointing agents. It is a fundamental rule of the law of agency that whatever a person may do in his own right he may do by means of an agent. Hence it follows that if one of several principals may of his own right act on behalf of the other principals, he may appoint an agent to act on their joint behalf. One of several principals has clearly no such power where each of them has a distinct interest in the subject matter, unless the others consent. In order, however, to put the matter more clearly, it will be well to say a few words of the several varieties of joint principals.

★ *Various kinds of joint principals.*—Where more than [★32] one person has an interest in any chattel, they are either tenants in common, joint tenants, or partners. With respect to joint tenants and tenants in common, the general rule is that one joint tenant or one tenant in common has no implied authority to appoint an agent to

act for the other co-owners.[1] Joint tenants, it is said, are seised *per my et per tout;* they have only a right to a moiety respectively. Hence, if all joined in a feoffment, each gave but his part (*a*).

Right of one or more joint tenants to authorize agent to give notice to quit for all.]—The effect of a notice to quit given by one of several joint tenants who have joined in a demise was for some time warmly disputed. The question appears to have been first definitely raised in *Right* v. *Cuthell* (*b*), though the opinion expressed by Lord Ellenborough was not a necessary part of the *ratio decidendi*, inasmuch as the notice to determine the lease was signed by two only of the three executors, there being a proviso in the lease that either landlord or tenant, or their executors, in case they wished to determine the lease, should give notice in writing under his or their respective hands. Hence there was not a sufficient compliance with the terms of the proviso.

In *Goodtitle* v. *Woodward* (*c*), which was decided in 1820, the question came again incidentally before the Court of King's Bench. A notice to quit was given by an agent, who professed to act on behalf of all the joint tenants who had granted the lease. At the time of giving the notice he had authority from some only of the joint tenants. The others subsequently ratified his conduct, and Abbott, C.J., was of opinion that the occupier, having received notice to quit, purporting to be given on the part of all the lessors, had then such a notice as he could act upon with certainty at the time it was given. Thus the learned judge decided the case by an application of the doctrine of ratification. It is submitted that this application of the doctrine is erroneous, though the decision itself may be well supported by the reasoning in *Doe* v. *Summersett* (*d*). This case, which was decided in the same court in 1830, fully raised the question whether a notice to quit, signed by one of several joint tenants on behalf of the others, will determine a tenancy [★ 33] ★ from year to year or to all. The court, over which Lord Tenterden presided, decided in the affirmative. It would seem that his Lordship had modified the opinion expressed in *Goodtitle* v. *Woodward* (*e*) respecting the applicability of the doctrine of ratification in such cases. The Attorney-General contended that the notice was valid, on two grounds—(1) that the adoption of the notice by the other lessor was equivalent to a prior command, and (2) that a notice to quit by one of several joint tenants put an end to the tenancy as to all. The court thought that the latter ground was right, nothing being said of the former. The reasoning of the judg-

(*a*) Bac. Abr., Estates, K. 6.
(*b*) 5 East, 491
(*c*) 3 B. & Ald. 689.
(*d*) 1 B. & Ad. 135.
(*e*) *Supra.*

[1] Sewell *v.* Holland, 61 Ga. 606; Holladay *v.* Daily, 19 Wallace, U. S. 607; Reinan *v.* Hamilton, 111 Mass. 245.

ment is worthy of notice. Where joint tenants join in a lease, each demises his own share (*f*), and each may put an end to that demise, as far as it operates upon his own share, whether his companions will join him in putting an end to the whole lease or not; so that upon a notice to quit by one of several joint tenants, no doubt his part might be recovered if there has been a separate demise. But though upon a joint lease by joint tenants each demises his own share, this is not the only operation of such a lease. Joint tenants are not only seised of their respective shares *per my*, but also of the entirety *per tout* (*g*). Upon a joint demise by joint tenants upon a tenancy from year to year, the true character of the tenancy is, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to that tenancy. The tenant has a right upon such a notice to give up the whole, and, unless he comes to a new arrangement with the other joint tenants as to their shares, he is compellable so to do. If upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint tenants must have the same right. It cannot be optional on one side and on one side only (*h*). This decision will render any further recourse to the reasoning in *Goodtitle* v. *Woodward* (*i*) unnecessary; but it will be noticed that the effect of the terms of the judgment in *Doe* v. *Summersett* (*j*) is so wide as to make it immaterial whether the ★ notice is given in the [★ 34] names of all the joint tenants, or simply in the name of a single joint tenant. Proceeding, then, upon the principal that whatever one may do in his own right he may do by an agent, the reasoning of the court in the latter case would support the proposition that one of several joint tenants, of his own will and by means of his agent, without professing to act on behalf of the other joint tenants, may put an end to the whole tenancy, provided either the lessee or other lessors so will. Whether this proposition would be supported in its entirety has not been determined (*j*). *Jones* v. *Phipps* (*k*), decided in 1868, is an authority for the proposition that a notice to quit given by an agent of joint owners in his own name is good provided he is authorized to act on their behalf, whether the authority is express or a matter of inference. In a previous case Lord Denman (*l*) expressed an opinion that a mortgagor could not as agent for a mortgagee give a notice to quit in his own name. This must now be taken subject to the above qualification. However, there

(*f*) Co. Litt. 186a.
(*g*) Litt. 288.
(*h*) Per. Cur., Doe *v.* Summersett, *supra*.
(*i*) *Supra*.
(*j*) *Supra*.
(*j*) See Doe *v.* Hughes, 7 M. & W. 139; and Doe *v.* Foster, 3 C. B. 215.
(*k*) L. R., 3 Q. B. 567.
(*l*) Doe *v.* Goldwin, 2 Q. B. 143, 146.

can be no doubt that if the agent of one of several joint tenants, who have granted a demise from year to year, is authorized by his principal to give notice to quit in the name of all the joint tenants, the notice is so far valid as to enable either the lessee or other lessors to act upon it.

Where there are several principals they are not necessarily partners.]—Several principals may employ the same agent without incurring a joint liability,—in other words without becoming liable as partners.[1] In Lindley on Partnership (*m*), the learned author has pointed out with great clearness the salient distinctions between coownership and partnership. The distinctions are of value in an examination of the law of agency, because one partner, as such, is an agent, actual or implied, of the others. Unlike partnership, coownership is not necessarily the result of agreement, nor does it necessarily involve community of profit or of loss. So true is it that partnership is a branch of the law of agency, that when a person is sought to be made liable on the ground of his being a partner, the true test is whether or not he has constituted the other alleged partner his agent in respect of the partnership business (*n*). [★ 35] So, too, ★ one of several tenants in common has no power as such to appoint an agent for the others.[2]

It will be sufficient to cite but a few cases in support of the above propositions. In *Coope* v. *Eyre* (*o*), decided in 1788, E. employed a broker to buy a quantity of oil, and agreed with the other defendants that they should have aliquot parts of it when purchased. E. was the only purchaser known to the plaintiffs, and entire credit was given to him alone. The purchases were made on speculation. The price of oil fell, and E. failed. The plaintiffs then brought an action to recover the price of the oil from all the defendants. A majority of the court held that E. alone was liable for the amount. The cases put by Mr. Justice Gould show the relation of the parties. A man goes into Yorkshire to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two; or a man is about to buy a tun of wine, and agrees that a friend shall have a hogshead. It surely cannot be contended that this could make the friend in either supposition a joint contractor, to subject him upon the failure of the other to pay for the whole bargain. In an earlier case it had been laid down by Lord Mansfield that it would be most dangerous if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts (*p*). *Gibson* v. *Lupton* (*q*) is a later de-

(*m*) Vol. I., p. 59.
(*n*) Buller *v.* Sharp, L. R., 1 C. P. 36 ; 35 L. J., C. P. 105.
(*o*) 1 H. Bl. 37.
(*p*) Hoare *v.* Dawes, 1 Doug. 371.
(*q*) 9 Bing. 297.

[1] Story on Partnership, § 90.
[2] Story on Agency, § 39.

cision of the Court of Common Pleas. A. and B. ordered an undivided parcel of goods; each was to pay for his own share. The freight and charges were actually so paid, and the cargo upon its arrival was equally divided before it was warehoused. No partnership had existed between them antecedent to this period. The strongest fact in support of the contention that the defendants purchased on their joint account was the plaintiff's reply to the original order, signed by both defendants, that a purchase had been made on their joint account. On the other hand, it was provided in the same order that payment was to be made by each of the defendants. Upon these facts it was held that the defendants were not jointly liable for the whole amount.

In *Nicholson* v. *Ricketts* (*r*), a decision of the Court of Queen's Bench in 1860, the defendants, merchants in London, entered ★ into a contract with S. and Co., merchants at Buenos [★ 36] Ayres, for the purpose of carrying on certain exchange operations. S. and Co. were periodically to draw bills on the defendants to be accepted by them, then put the proceeds in the bank, and so profit by the rate of exchange. S. and Co. were also periodically to remit and redraw other bills on the defendants to the same amount; the proceeds of this operation to be applied to a common fund, it being agreed that there should be a community of profit and loss between them. S. and Co. drew bills on the defendants and sold them, in conformity with the arrangement; but the defendants refused to accept them. The present action was brought to establish the liability of the defendants upon the bills, on the ground that there was a partnership existing between S. and Co. and the defendants. The court was unanimous in giving judgment for the defendants.

Authority of partners and co-owners.]—It is a well-known principle of the law of partnership that, in order to bind a partnership by an act done by another member of the partnership in the way of drawing or accepting a bill, such partner must have an express or implied authority so to bind his fellow partner. In ordinary cases of mercantile partnership there is no need of such express authority, as the law implies it. So, also, if from the nature of the partnership it is apparent that drawing bills by the members is essential, authority in each partner to draw them will be implied. Although there was a partnership in one sense, S. and Co. had no authority to bind the defendants with the obligation of accepting these bills, still less to hold out to the world that they had authority to do so (*s*). Hence, where A., B., and C. are in partnership, and arrange that C. shall draw bills in his own name on A. and B., it cannot be said that C.'s signature to such bills binds the others (*t*). Part-owners by the

(*r*) 1 L. T. Rep.. N. S. 54; 2 Ell. & Ell. 497.

(*s*) Per Cockburn, C. J., *ibid.*

(*t*) See per Crompton, J., *ibid.*: and *Re* The Adansonia Fibre Co. (Limited); Miles and Co.'s claim, 31 L. T. Rep., N. S. 9; L. R., 9 Ch. App. 635; 43 L. J., Ch. 732.

joint employment of a ship become partners in respect of the adventure (*u*). But one part-owner cannot, without the common consent of the owners, insure the shares of the other part-owners, so as to make the insurance a charge upon the joint proceeds, unless the ship is partnership property (*x*). Each of several co-owners of a [★ 37] thing can only sell or authorize ★ the sale of his own interest in that thing, but all the co-owners may combine to sell or authorize the sale of the whole thing (*y*). There is, again, nothing which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property. Whether they have done so or not depends upon the circumstances of the particular case (*z*).

Committeemen — Projectors — Commissioners and members of clubs.]—The question often arises whether persons who combine to carry out certain plans or schemes are joint principals in any transaction.[1] The rules governing the liability of committeemen, projectors, and the like, do not differ in principle from the ordinary rules by which a question of liability upon a contract is determined. Thus, in an action against commissioners to recover the value of certain maps and plans which had been ordered by their secretary, Chief Justice Tindal directed the jury that the question for their consideration was, whether the work in question had been done on the credit of the defendants, either upon an express or an implied contract (*a*).

In another case, *Lake* v. *Duke of Argyll* (*b*), the Court of Queen's Bench drew a distinction between acts done by a company in exe-

(*u*) Bovill *v.* Hammond, 6 B. & C. 149.
(*x*) Lindsay *v.* Gibbs, 28 L. J., Ch. 692; Hooper *v.* Lusby, 4 Camp. 66.
(*y*) Keay *v.* Fenwick, 1 C. P. Div. 745.
(*z*) *Ibid.*
(*a*) Wood *v.* Duke of Argyll, 6 M. & G. 928.
(*b*) 6 Q. B. 477.

[1] Where the members of a literary association agree to subscribe a certain sum annually to defray the expenses, and appoint a committee to purchase books, &c.; the committee becomes personally liable for all purchases and the vendor cannot sue the other members of the club or even lay claim to their unpaid subscriptions; Ridgely *v.* Dobson, 3 W. & S. 118. In order to charge a member of a committee, appointed for the purpose of erecting a building in aid of public enterprise, with the price of plans and specifications prepared by an architect, who knew that all contributions of the citizens were to be gratuitous, it is necessary that he should have expressly promised to become personally liable; Dunton *v.* Chamberlain, 1 Illi. Ap. 361.

A member of a building committee of a church will become personally liable for debts contracted by the committee in the execution of its duty, in the absence of any limitation by him of his obligation; Cruse *v.* Jones, 3 Lea (Tenn.), 66.

The members of a committee appointed by a political meeting to provide a free dinner for the party are personally liable for the bill; Eichbaum *v.* Ivons, 6 W. & S. (Pa.) 67. "The law, in all these cases, pronounces the same decision; that he to whom credit is knowingly and exclusively given, is the proper person who incurs liability, whether he be the principal or agent;" Story on Agency, § 288.

cution of their project, and acts done by those who held meetings preliminary to the formation of the company, and pointed out that when persons meet to prepare the measures necessary for calling the company into existence, attendance at such meetings, and concurrence in the measures there passed, might be strong evidence that any individual then present and taking part in the proceedings held himself out as a paymaster to all who executed their orders.

In *Reynell* v. *Lewis* (*c*), the Lord Chief Baron directed the jury to consider whether the defendant had become a provisional committeeman; and if he had, whether by taking on him that character and afterwards acting in the affairs of the company as he had done, he had authorized the solicitor, secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company and on its behalf; and if so, then whether the work was done, and the credit given, on the ★faith of his being [★ 38] so personally responsible. With this direction, which met with the approval of the Court of Exchequer, the Court of Queen's Bench fully agreed (*d*).

An opinion at one time prevailed that the mere fact of consenting to insert his name in the prospectus as a provisional committeeman would render a man liable upon all contracts entered into by or on behalf of such provisional committee. This is not strictly correct. With reference to this opinion it was observed by Lord Denman in *Bailey* v. *Macaulay* (*e*), that while the status of provisional committeemen was thought in itself to create liability, it was evidently important to prove the period at which a defendant was first invested with that character. But when, on a fuller consideration, the liability was recognized as arising from a contract to be inferred from giving orders for the goods or services, the inquiry was no longer, "When did he become a committeeman?" but "When did he take a part in given such orders?"

In *Horsley* v. *Bell* (*f*), which was decided in 1778, an Act of Parliament which had been passed to make a brook navigable, named the defendants, amongst other commissioners, to put the act in operation, with power to borrow money. The defendants, being the acting commissioners, employed the plaintiffs to do different parts of the works, and such of the commissioners as were present at the several meetings made orders relative thereto. Every one of them was present at some of the meetings, but no one of them was present at all the meetings. The fund proved insufficient, and the court was asked to decide whether the defendants were personally liable. The judges, viz., Lord Chancellor Bathurst, assisted by

(*c*) 15 M. & W. 519.
(*d*) Bailey v. Macaulay, 13 Q. B. 815.
(*e*) *Supra*.
(*f*) Amb. 770.

Justice Gould and Ashurst, held that the commissioners who acted under the trust were personally liable to all the contracts, as well those which where made at the meetings when they were not present as at the others, and observed that the defendants had power to borrow money, and ought to have taken care to be provided.

In *Fleming* v. *Hector* (*g*), decided in 1836, a club was formed subject to the rule that a certain entrance fee and subscription should be payable, and that a committee should "manage the affairs of the club." The present action was for wines supplied to [★ 39] ★ the club before its dissolution. The defendant was a member who had duly paid his subscription and entrance fee. At the trial Lord Abinger directed a verdict for the plaintiff, reserving leave to enter a nonsuit, being of opinion that such institutions were the nature of partnerships, and subject to the same incidents, so far as concerned the authority of the committeemen. When the question came on for argument before the full court, his Lordship expressed the contrary opinion, in which the other judges concurred, and a rule to enter a nonsuit was made absolute. The main ground upon which the decision rested was that the plaintiff could not recover unless he showed that the contract upon which he sued was made by a person authorized to contract on behalf of the defendant. The question, as Baron Parke observed, was whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered the goods was the authorized agent of the defendant in making the contract. That really is the question in all cases of this kind, in all cases of principal and agent or master and servant—whenever the contract is not made personally by the defendant.

This decision was acted upon in 1841, in *Todd* v. *Emly* (*h*), where the evidence was that a club was formed, and a fund subscribed which was to be administered by a committee. It was held that the committee must be supposed to have agreed to do that which the subscribers to the club had power themselves to do—that was to administer the fund of the club so far as it went, and not to deal on credit, except for such articles as it might be immediately necessary for them to have dealt for on credit. An attempt to bring the case within the principle of *Horsley* v. *Bell* (*i*) failed, inasmuch as there was no common purpose shown of dealing on credit for such articles as were the subject of the action.[1]

(*g*) 2 M. & W. 172.
(*h*) 7 M. & W. 427.
(*i*) *Supra.*

[1] Hence it is, that although it is perfectly well known, that a person is acting as agent for others, as, for example, a club, if articles are furnished for the club at his request, upon the exclusive credit of the agent, or of any other particular member, no other persons composing the club, will be liable therefor. Story on Agency, § 289.

The effect of obtaining judgment against one joint principal.]—The House of Lords, in *Kendall* v. *Hamilton* (*k*), affirmed the rule that a judgment recovered against one or more of several joint contractors is, even without satisfaction, a bar to an action against another joint contractor sued alone, and that this rule is not affected by the operation of the Judicature Acts.[1]

(*k*) L. R., 4 App. 504, 1879.

[1] In Pennsyluania the law is different, Act of 6th April 1830, P. L. 277, and Act of 1848 P. L. 536. The fifth section of the latter Act provides "That when a judgment shall he hereafter recovered against one or more of several co-partners, joint or joint and several obligors, promissors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to recovery in any subsequent suit or suits against any person or persons who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process."

[★ 40] ★CHAPTER V.

JOINT AGENTS.

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Execution of a joint authority—Distinction between public and private agency.]—Where an authority is given to a number of agents, a question may arise with regard to the proper mode of executing such authority. The difficulty here referred to relates only to cases governed by the general rules of law regulating the execution of a joint authority. A distinction must be made in this respect between public and private agency. In the latter case it is a rule of the common law that where an authority is given to two or more persons to do an act, the act will not bind the principal unless all concur in doing it.[1] Thus it is said in Coke upon Littleton (*a*) that if joint attorneys were appointed to receive livery for for another, and livery and seisin were made to one of them in the name of both, this would be clearly void, unless the authority was joint and several, because they had but a bare authority, both in law making but one attorney. So it is laid down that in consider-

(*a*) Page 496.

[1] And the rule applies in all cases, whether the duty be ministerial or judicial. Johnston *v.* Bingham, 9 W. & S. 56; Downing *v.* Rugar, 21 Wend. (N. Y.) 178.

Where there is a devise to executors to sell land, and not coupled with any interest, the sale can only be executed by all the executors named in the will. Should one or more of them become incapacitated by death or otherwise, the power does not survive to the others. Franklin *v.* Osgood, 14 Johns. (N. Y.) 527. The same where one of two agents become incapacitated. Salisbury *v.* Brisbane, 61 N. Y. 617.

In a joint power of attorney to two or more persons all must act jointly, and one cannot delegate power to the others to act for him. Loeb *v.* Drakeford, 75 Ala. 464.

If it appears, however, by the instrument conferring the authority, that it is not necessary that all should join in the execution of the power, it will be so construed. Cedar Rapids & St. Paul R. R. *v.* Stewart, 25 Iowa, 115.

Where a power conferred upon several persons is not a mere naked one but is coupled with an interest, the survivor or survivors, as the case may be, is capable of executing it. Peter *v.* Beverly, 10 Peters (U. S.), 532.

ing whether the authority of two or more joint agents survives upon the death of one of them, we must note there is a diversity between a naked trust or authority and one coupled with an estate or interest, as well as between authorities created by the party for private causes, and authority created by law for the execution of justice. Hence if a man give a letter of attorney to two, to do any act, and one of them die, the survivor shall not do it; ★ but [★ 41] if a *venire facias* be awarded to four coroners to impanel and return a jury, and one of them die, yet the others shall execute and return the same. So if a charter of feoffment were made, and a letter of attorney to four or three jointly or severally to deliver seisin, two of them could not make livery; whereas, if the sheriff upon a *capias* directed to him made a warrant to four or three jointly or severally to arrest the defendant, two of them might arrest him, because it is for the execution of justice, which is *pro bono publico*, and therefore shall be more favourably expounded than when it is only for private ends, according to the maxim, "*Jura publica ex privato promiscuè decidi non debent*" (*b*).

In *Brown* v. *Andrew* (*c*), eight persons were appointed as a managing committee by a provisional committee of a projected line. They were directed to take the most energetic measures for carrying out the undertaking. No authority was given to any number less than the whole to act as a quorum. Six of the eight members employed the plaintiff to take an account of the traffic. Upon an action for work and labour done being brought against one of the provisional committee, the question for the decision of the court was whether the authority vested in the eight had been properly executed. The court consisting of Lord Denman, Patteson, Coleridge, and Wightman, JJ., maintained the general rule of law, being of opinion that the authority was joint only. Judgment was therefore given for the defendant.

Joint and several authorities.]—The strict rule, that a joint and several authority will be stringently construed, has in recent times been somewhat relaxed. Thus, in the old law books it was said that, if a letter of attorney to make livery of seisin, *conjunctim et diversim*, be made to three, and two of them make livery, the third being absent, it was not good, for this is not *conjunctim* or *disjunctim* (*d*). In *Guthrie* v. *Armstrong* (*e*), decided in 1822, a power of attorney given to fifteen persons jointly or severally was executed by four of them; this was held to be a sufficient execution of the power: Abbott, C. J., whilst acknowledging the correctness of the old authorities, declined to extend the rule to any new cases.[1]

(*b*) Co. Litt. 181b.
(*c*) 18 L. J., Q. B. 153.
(*d*) Viner's Abridg. "Attorney," B. 7; and see Com. Dig. "Attorney," C. 11; and Co. Litt. *supra*.
(*e*) 5 B. & Ald. 628.

[1] Cedar Rapids & St. Paul R. R. *v.* Stewart, 25 Ia. 115.

[★ 42] ★ *Execution of a power of a public nature by majority.*]—Where the authority is of a public character, the argument *ab inconvenientiâ* has been admitted in support of the validity of acts done by order of less than all the persons authorized to concur (*f*). In *Witnell* v. *Gartham* (*g*), Lawrence, J., states it as a general principle that where a body of persons is to do an act, the majority of that body will bind the rest;[1] and in *Grindley* v. *Barker* (*h*), after an elaborate judgment, it was decided by the court, consisting of Chief Justice Eyre, and Justices Buller, Heath and Rook, that if a power of a public nature be committed to several, all of whom meet for the purpose of executing it, the act of the majority will bind the minority. "It seems to me," said Mr. Justice Buller, "that the authority of Co. Litt. 181b, if we went no further, is decisive; because it is there said in express terms that in matters of public concern the voice of the majority shall govern. . . . Not a single case, not a dictum has been quoted on the other side of the question." Similarly a distress warrant directed to two, if connected with the execution of a public authority, may be executed by one (*i*).

(*f*) Rex *v.* Beeston, 3 T. R. 592, *per* Lord Kenyon, C. J.; and see Attorney-General *v.* Davy, 2 Atk. 212.

(*g*) 6 T. R. 398.

(*h*) 1 B. & P. 229.

(*i*) Lee *v.* Bessey, 1 H. & N. 90; 25 L. J., Ex. 271.

[1] Worcester *v.* R. R. Co., 113 Mass. 161; Soens *v.* Racine, 10 Wis. 271; McCready *v.* Guardians of the Poor, 9 S. & R. 99; Commissioners *v.* Lecky, 6 S. & R. 166; Caldwell *v.* Harrison, 11 Ala. 755; Keyser *v.* School District, 35 N. H. 477; Martin *v.* Lemon, 26 Conn. 192.

Where a public authority is conferred upon two, to prevent a failure of justice or injury to the public, one may act without the concurrence of the other. The other's consent is supposed, upon the presumption in favor of the performance of official duty. One of two overseers of the poor may seize property belonging to a person who has absconded and left his wife and children to be provided for by the town. Downing *v.* Rugar, 21 Wend. (N. Y.) 178.

★ CHAPTER VI [★43]

THE DOCTRINE OF DELEGATION.

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SECT. 1.—*The Delegation of Original Authority.*

Delegation—meaning of term.]—Delegation in the sense assigned to the term at the common law means the act of investing one or more persons with authority to do some act or acts. The term is applicable not only to cases where the person who delegates has himself authority in his own right to do the act the performance of which he delegates to another, but also to those cases where the person who delegates has only a delegated and not an original authority to do that which he delegates to another. In other words, the appointment of a sub-agent by an ★ agent, no less [★44] than that of an agent by a principal, involves a delegation of authority. An authority or power, then, is either original or it is delegated. Where the authority is original, the general maxim of

the law of England applies, that whatever a person may do of his own right he may do by another. Where, on the other hand, the authority in question is a delegated authority, the well-known rule is that such an authority cannot itself be delegated.[1] Both rules, as will be seen herafter, are subject to modifications and exceptions.

Delegation of authority distinguished from its due exercise.]—The distinction between a delegation of authority and the due exercise of the authority was examined and acted upon by the House of Lords in *Osgood* v. *Nelson* (*a*). A corporate body having the power to dismiss one of its officers holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it, and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the officer, who was then called upon for his defence. The mode in which the inquiry was held was the mode in which such inquiries were ordinarily conducted. Counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office, and the House of Lords held that this was not a case of delegation of authority, but a due exercise of the same by the corporation itself.

What a man may do of his own right he may do by an agent—not so where his authority is derivative.]—The main features of the distinctions now recognized in our courts of law with regard to the right of delegation possessed by any individual, were recognized at an early date. Thus, Lord Chief Baron Comyns sums up the result of the authorities in the rule, that in all cases where a man has a power, as owner or in his own right, to do a thing, he may do it by attorney (*b*); but if the authority is personal to himself, it cannot be delegated (*c*). A later writer makes the same distinction, though somewhat more fully. One who has an authority to do an act for another must execute it himself, and cannot transfer it to another, because it is a trust and confidence reposed in the party; it cannot be assigned to a stranger (*d*). But he fails to bring out as clearly [★45] as the Lord ★ Chief Baron has done, the important distinction involved in the phrase "in his own right," which is convenient for many purposes, though it does not accurately mark off the

(*a*) L. R., 5 H. L. 636.
(*b*) Com. Dig. "Attorney," C. 1.
(*c*) *Ibid.*, C. 3; and 9 Co. 76a.
(*d*) Bac. Abr. "Authority," D.

[1] 2 Kent's Com. 633 (13th. edition); Warner *v.* Martin, 11 How. 209; Lynn *v.* Burgoyne, 13 B. Mon. 400; Emerson *v.* Hat Co., 12 Mass. 241; Bocock *v.* Pavey, 8 Ohio St. 270; Brewster *v.* Hobart, 15 Pick. (Mass.) 302; Mayer *v.* McClure, 36 Miss. 394; Connor *v.* Parket, 114 Mass. 331; Locke's App., 72 Pa. St. 491; McClure *v.* Miss. Val. Insurance Co., 4 Mo. Ap. 148; Crozier *v.* Reims, 4 Illi. App. 564; Hunt *v.* Douglass, 22 Vt. 128; Furnas *v.* Frankman, 6 Nebr. 429; Loomis *v.* Simpson, 13 Iowa, 532; McCormick *v.* Bush, 38 Tex. 314; Smith *v.* Sublett, 28 Tex. 163.

limits of the power of delegating authority possessed by an individual.

There can be no delegation of an authority to do (1) *an illegal act, or* (2) *an act of a personal nature.*]—Where, then, the authority is original, and not derivative, the exceptions to the rule allowing full power of delegation, may be ranged under two heads. There can be no delegation of the performance:

(1) Of an illegal act;[1]

(2) Of an act of a personal nature.[2]

In the celebrated case of *Collins* v. *Blantern* (*e*), decided by the Court of Common Pleas, Chief Justice Wilmot, in delivering the judgment of the Court upon the question of illegality, said: "This is a contract to tempt a man to transgress the law, and do that which is injurious to the community; it is void by the common law; and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he have once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back." As pointed out by the same learned judge, this is substantially an expression of the maxims of the civil law: "*Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se promittat, non valet*" (*f*). "*Rei turpis nullum mandatum est*" (*g*). "*Illud quoque mandatum non est obligatorium, quod contra bonos mores est; veluti si Titius de furto, aut de damno faciendo, aut de injuria facienda mandet tibi*" (*h*). To the same effect are the remarks of Lord Mansfield in *Holman* v. *Johnson* (*i*), decided in 1775. "The objection that a con-

(*e*) 2 Wils. 341. (*f*) Inst. III., 20, 23. (*g*) Dig. 17, 1, 6, 3.
(*h*) Inst. III., 27, 7. (*i*) 1 Cowp. 343.

[1] A contract cannot be enforced if it is directly connected with or grows out of an illegal or immoral act. Armstrong *v.* Toler, 11 Wheat. 258, even though it be a new contract, as long as it results from, or even a part of it is connected with, the illegal consideration, the court will not enforce it, *id.*

A contract founded on a new consideration and not in any particular connected with such illegal act will be enforced, *id.* A contract to get an act passed by the Legislature by means of personal influence is void. Clippinger *v.* Hepbaugh, 5 W. & S. (Pa.) 315; Rose *v.* Fraux, 21 Barb. 361; Marshall *v.* B. & O. R. R., 16 How. 314.

The burden of proving that the instructions of the principal are illegal falls on the agent, when the latter refuses to follow them. The general rule being, that such instructions are presumed to be lawful. R. R. Co. *v.* Bayfield, 37 Mich. 205.

See, also, Brooks *v.* Martin, 2 Wallace, 70; Greenwood *v.* Curtis, 6 Mass. 58; Brown *v.* Howard, 14 Johns. 119; Davis *v.* Barge, 57 Ind. 54; Trist *v.* Child, 21 Wall. 441.

[2] Locke's Appeal, 72 Pa. St. 491; Warner *v.* Martin, 11 How. 209; Loomis *v.* Simpson, 13 Iowa, 532; Ratcliff *v.* Baird, 14 Tex. 43; Pollard *v.* Rowland, 2 Black, 22; Stone *v.* State, 12 Mo. 400.

tract is immoral or illegal, as between plaintiff and defendant," said the learned judge, "sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is now allowed; but it is founded in general principles of policy, which [★ 46] the defendant has the advantage of ★ contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. If so, upon that ground the court gives, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *Potior est, conditio defendentis.*" Whatever militates against public policy, public decency, or morals, is illegal. Thus, bonds in general restraint of trade (*j*), and powers of attorney given for the purpose of preventing proceedings on a penal rule (*k*), are illegal. These principles are well established.

Acts of a personal nature cannot be delegated.]—A few instances of the second exception will suffice to show its application. Thus, it is said a man could not do homage or fealty by attorney, for the service is personal (*l*). So the lord might beat his villain, and if it were without cause the villain had no remedy; but the lord could not authorize another to beat him without cause (*m*). On the same grounds, anyone who has but a bare authority or power cannot act by another (*n*), unless the authority or power is ministerial. So, too, a man who is enabled to do a thing by special custom cannot do it by attorney if he is not warranted by the custom to do so; as where an infant by custom may make a feoffment at fifteen years (*o*).[1]

SECT. 2.—*Delegation of Authority by Agents.*

Various reasons given for the application of the maxim, "Delegata potestas non potest delegari."]—The general principle of our law is consistent with that of the civil law in denying to agents, [★ 47] ★ except in certain cases, the right of delegating the authority with which they have been invested. The maxim "*Delegata potestas non potest delegari*" is equally appropriate to both systems

(*j*) Mitchell *v.* Reynolds, 1 Sm. L. C. 406, and cases there cited.
(*k*) Kirwan *v.* Goodman, 9 Dowl. 330.
(*l*) 9 Co. 76a. (*m*) *Ibid.* (*n*) *Ibid.* (*o*) *Ibid.*, 76b.

[1] See note 2, Page 45, *ante.*

of law. If no express authority for the power of delegation exists, there is a presumption that the agent has no such power. When the maxim has been applied various reasons have been given for its application. Thus it is said an agent cannot delegate his authority where his personal skill is essential (*p*),[1] or where the authority is a judicial authority (*q*), or where it is a trust and confidence reposed in the agent (*r*),[2] or where the authority gives the agent a discretionary power (*s*),[3] unless the discretion is to be exercised in respect of a merely ministerial act, in which case a deputy may be appointed (*t*).[4]

Illustrations of the maxim.]—Upon the grounds indicated in the above principles, Lord Hardwicke decided that when a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, the power should be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person (*u*). So, where personal estate was given to such charitable use as A. should appoint, and he directed the money to be applied as B. should appoint, the delegation was held void (*x*). So, too, where a testator gave his wife a power to appoint personalty among their children, and she delegated the power by will to others (*y*). For a similar reason, where a person's consent was made requisite to the due execution of a power, he could not empower another to give consent to it as his attorney (*z*). Again, if A. lends B. a horse

(*p*) Burial Board of St. Margaret, Rochester *v.* Thompson, L. R., 6 C. P. 457.
(*q*) Baker *v.* Cave, 1 H. & N. 678.
(*r*) Bac. Abr. "Authority," D.
(*s*) Alexander *v.* Alexander, 2 Ves. 640.
(*t*) Per Willes, J., in Burial Board, &c. *v.* Thompson, *supra*, 458.
(*u*) Ingram *v.* Ingram, 2 Atk. 88; and see Hamilton *v.* Royse, Sch. 2 & Lef. 330.
(*x*) Attorney-General *v.* Berryman, 2 Ves. 643.
(*y*) Alexander *v.* Alexander, *supra*.
(*z*) Hawkins *v.* Kemp, 3 East, 410.

[1] As in case of a factor, Warner *v.* Martin, 11 How. 209; Loomis *v.* Simpson, 13 Iowa, 532; or a broker, Locke's Appeal, 72 Pa. St. 491, or an attorney, Johnson *v.* Cunningham, 1 Ala. 249, except under certain circumstances. Pollard *v.* Rowland, 2 Black. 22; Ratcliff *v.* Baird, 14 Tex. 43; or an auctioneer, Stone *v.* State, 12 Mo. 400. See Laussatt *v.* Lippincott, 6 S. & R. (Pa.) 386.

[2] Emerson *v.* Hat Co., 12 Mass. 241; Lynn *v.* Burgoyne, 13 B. Mon. 400; Sheehan *v.* Gleeson, 46 Mo. 100; Foss *v.* Chicago, 56 Illi. 354; Richardson *v.* Heydenfeldt, 46 Cal. 68; State *v.* Patterson, 34 N. J. L. 163.

[3] An agent whose duties and powers involve a personal trust and confidence cannot, in the absence of a known usage of trade to the contrary or authority from the principal, or a case in which necessity requires the appointment of a sub-agent delegate his power to another. But such an agent, after determining the course to be pursued may appoint another to do the ministerial acts necessary. Titus *v.* C. & F. R. R. Co., 46 N. J. L. 393. See also Connor *v.* Parker, 114 Mass. 331; McClure *v.* Insurance Co., 4 Mo. App. 148.

[4] Brokers or agents can authorize a clerk or sub-agent to do acts which are merely ministerial and do not require the exercise of discretion. Williams *v.* Woods, 16 Md. 220; Titus *v.* R. R. *supra*.

to ride to York, B. cannot let his man ride him, for the licence is a matter of pleasure annexed to the person of B., and cannot be transferred (*a*); but it is otherwise where a certain time is limited for the loan of the horse, for here B. has an interest in the horse, and may let his servant ride him (*b*). Upon the same ground, where [★ 48] there was a trust to dispose of ★ certain property to such of the relations and kindred of the testator, in such manner as his trustees and executors should think proper, and the trustees and executors died, the survivor devising the trust estates to A. and B., and making them executors as to the personal part of the property, Sir William Grant decided that A. and B. could not execute the power, for the reason that wherever a power was of a kind that indicated a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom by legal transmission the same character may and appears to belong (*c*). By an agreement, B. was to have a claim upon a coach supplied by him to A. until the debt was paid. A. died, and his administratrix sent the coach to B. for repairs. B. detained it. "If A." said Lord Tenterden, in delivering the judgment of the court, "had lived, and the coach on non-payment of the bill, had been taken out of his possession, and he had brought an action, the defendant might, in bar of that, have relied on the instrument. But as the licence was a mere personal licence, not transferable, supposing the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach" (*d*). The principles stated by the earlier legal writers upon the subject under examination do not differ in any essential particular from the principles in force at the present day. They are, indeed, identical in substance, and may be traced to the same general principle that an authority to delegate a delegated authority will not be presumed when such delegated authority is enjoyed as a personal trust. Thus, inasmuch as a principal employs a broker from the opinion he entertains of his personal skill and integrity, a broker has no right, without notice, to turn his principal over to another of whom he knows nothing (*e*).[1] So if a notice to quit is given by an agent of an agent, it is invalid unless authorized by the principal (*f*). So, too, when an act of parliament for building a bridge ordered that when any notice was to be given by the trustees appointed and acting under it, such notice should be in writing or in print, signed by three [★ 49] or more of the trustees, or ★ by their clerk or clerks, the

(*a*) Boinglo *v.* Morris, Mod. 210.
(*b*) *Ibid.*; and 2 Ld. Raym. 913, 915, 916.
(*c*) Cole *v.* Wade. 16 Ves. 27.
(*d*) Howes *v.* Bell, 7 B. & C. 481.
(*e*) Per Lord Ellenborough. Cockram *v.* Irlam, 2 M. & S. 301.
(*f*) Doe *v.* Robinson, 3 Bing. N. C. 677.

[1] Lock's Appeal, 72 Pa. 491.

Court of Queen's Bench held that a notice signed with the names of the clerks to the trustees, but signed in fact by a clerk employed by them, was insufficient, on the ground, *inter alia*, that the authority of the clerks could not be delegated. Again, if A. delivers goods to B. for sale by him at a particular place, B. has no right to send them elsewhere, under the care of another person, in search of a market, although he is unable to sell them at the place appointed (*g*). On the same grounds, it was remarked by Lord Eldon, that it is a very dangerous doctrine to maintain that if an auctioneer is authorized to sell, all his clerks, when he goes out of town, are, in consequence of any usage in that business, agents for the persons who authorized him (*h*).

Employment of agents by trustees.] — It is settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may, in the administration of the trust fund, avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result (*i*). But he must not deposit the money at interest with the agent till the investment is found, for that is in effect lending it on the agent's own personal security, and is a breach of trust (*k*). The early case is that of *Ex parte Belcher* (*l*). The statute 22 & 23 Vict. c. 35, s. 31, is in conformity with that authority. Although a trustee is not entitled to charge for his own trouble and loss of time,[1] he will be permitted in proper cases to employ agents at the expense of the trust estate, *e. g.*, an accountant (*m*), a bailiff (*n*), a collector of rents (*o*) or of book debts (*p*) may be employed. The *cestui que trust* may be appointed agent or bailiff to receive rents and profits, but the trustee should be careful that he does not allow any of the tenants to take advantage of the Statute of Limitations (*q*). ★An [★ 50] agent acting for trustees has no lien on the trust fund for his expenses (*r*).

(*g*) Catlin *v.* Bell. 4 Camp. 183.
(*h*) Coles *v.* Trecothick, 9 Ves. 250.
(*i*) See *per* Lord Fitzgerald, Speight *v.* Gaunt, 9 App. Ca. 29.
(*k*) *Ibid.*, p. 19; and see Rowland *v.* Witherden, 3 Mac. & G. 568, 574; and Floyer *v.* Bostock, 35 Beav. 603, 606.
(*l*) Amb. 218.
(*m*) Henderson *v.* M'Iver, 3 Mad. 275.
(*n*) Chambers *v.* Goldwin, 9 Ves. 272.
(*o*) Stewart *v.* Hoare, 2 B. C. C. 633.
(*p*) *Re* Brier, 26 Ch. D. 238.
(*q*) Melling *v.* Leak, 16 C. B. 652.
(*r*) Worrall *v* Harford, 8 Ves. 4; Feoffees of Heriot's Hospital, 12 Cl. & Fin. 507.

[1] In this country a trustee is entitled to compensation for services. The amount in some States being regulated by statute, in others by the court to which the trustee must account. Bispham's Equity, § 144 (3rd Ed.).

Employment of broker by trustee.]—A trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust, and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments (*s*).

Such agents accountable to the trustee.]—Agents employed by a trustee are in general accountable to the trustee only (*t*), and cannot be made responsible to the *cestui que trust* for a breach of trust unless they have taken an actively fraudulent part in committing the breach (*u*).[1]

Distinction founded upon the distinction between ministerial and judicial acts.]—An important distinction to be borne in mind in considering whether an agent may or may not appoint a deputy to do wholly or in part that which the agent is himself appointed to do, is founded upon the distinction between a ministerial and a judicial officer. The former may, whereas the latter, unless expressly authorized, may not, appoint a deputy (*v*). Hence, it was said, a constable, a chamberlain, an alderman, an auditor in the exchequer, an escheator, a sheriff, a dean, a parish clerk, being ministerial officers, could appoint a deputy (*x*). The true distinction would appear to be that which is drawn between acts which are ministerial and acts which are judicial in their character. Thus, at the trial of a cause under the Writ of Trial Act (3 & 4 Will. 4, c. 42), before the sheriff, a verdict was by consent taken for the plaintiff, subject to a reference. It was agreed by both parties that the arbitrator should have power to order a verdict to be entered for either party. The award was made, and judgment signed accordingly. The plaintiff then obtained a rule calling upon the defendant to show cause why the award, the verdict, and the judgment, should not be set aside. The court set aside the two latter, but not the former. Alderson, B., having pointed out that the sheriff did [★ 51] not, under ★ the above act, enjoy all the powers of a judge at Nisi Prius, went on to say: "The sheriff had no authority to give power to another to alter the verdict of the jury. It would be very inconvenient that a sheriff should have power to order a refer-

(*s*) Speight *v.* Gaunt, 9 App. Ca. 1.

(*t*) Maw *v.* Pearson, 28 Beav. 196.

(*u*) Fyler *v.* Fyler, 3 Beav. 550, and cases cited. Lewin on Trusts, p. 191, 8th ed.

(*v*) 1 Roll. Abr. 591, tit. "Deputie;" affirmed by Parke, B., in Walsh *v.* Southworth, 6 Ex. 156; Com. Dig, "Officer," D. 1.

(*x*) See authorities cited, Com. Dig. "Deputy," D. 1.

[1] If an agent of a trustee acts fraudulently and collusively, he may himself be treated as a trustee by construction, and so held accountable to the *cestui que trust*. If he secures to himself any benefit by a breach of trust, he will be responsible for the property to the party entitled to the beneficial interest. If by an abuse of his power as simple agent he obtains possession of trust property the *cestui que trust* may proceed against him as a trustee; Lehman *v.* Rothbarth, 111 Illi. 185.

ence of cases sent to be tried before him" (*y*). The distinction between acts judicial and acts ministerial is fully recognized in *Baker* v. *Cave* (*z*). "Judicial acts," says the learned Chief Baron, "must contain in themselves the source of the power, but that rule does not apply to ministerial acts." Many of the cases under this head refer to the doings of arbitrators and umpires.

A judicial authority cannot be delegated.][1]—In *Little* v. *Newton* (*a*) a reference was made to a barrister and two merchants for their award, or the award of any two of them. After all the matters in dispute had been discussed, it was agreed between the barrister and one of the merchants to make an award in favour of the plaintiffs, subject to the decision of the barrister upon a point of law. The latter accordingly, having decided the point in favour of the plaintiff, drew up the award in his favour, without any further communication with either of the other arbitrators. The court set the award aside on the ground that the parties were entitled to have the joint judgment of two at least of the arbitrators upon every point submitted to them, and that the judicial authority possessed by each arbitrator could not be delegated by him. "It is true," said Chief Justice Tindal, "that both arbitrators named by the plaintiff and defendant respectively had declined to interfere in the question of law, and had given up their opinion to that of the third. But there is no principle of law that we are aware of which will authorize any such delegation of the judicial authority conferred upon the three;[2] and it is impossible to say that if the determination of the legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award, some argument or observation might not have been made which would have led to a different conclusion." When matters in difference are submitted to arbitrators, it is presumed that the arbitrators will themselves exercise their judgment. Of course, where arbitrators are authorized to call in a competent person to assist ★ them, [★ 52] it is no objection that they have availed themselves of the assistance of such person in deciding the questions submitted to them (*b*). Nor can there be any doubt that a legal arbitrator might properly

(*y*) Wilson *v.* Thorpe, 6 M. & W. 721.
(*z*) *Per* Pollock, C. B. 1 H. & N. 678.
(*a*) 2 Scott, N. R. 509.
(*b*) Anderson *v.* Wallace, 3 Cl. & F. 26.

[1] Where an instrument under seal, by which three persons were appointed referees to settle an account, provided that if either of the referees aforesaid do not attend at the time and place appointed, another or others are to be chosen in their room, "it was held that after the death of one, the two remaining referees had no authority to appoint a third, and that all proceedings subsequent to such appointment were void. It was the duty of the parties to the instrument to supply the vacancy. Potter *v.* Sterrett, 24 Pa. St. 411. See, also, Haff *v.* Blossom, 5 Bosworth, 559.

[2] Where referees are appointed they cannot find the facts specially and submit the law to the Court. Their report must be such as *per se* to justify the entry of a judgment upon it. Sutton *v.* Horn, 7 S. & R. (Pa.) 228.

consult an eminent scientific person upon a question within the scope of his profession, and adopt his opinion (*a*). But, although an arbitrator or umpire may consult such persons, his award must be the act of his own mind (*b*). The cases here cited show how necessary it is to avoid confusing a consultation with eminent scientific men, or a giving away by one arbitrator to the opinion of another with a delegation of authority.

Appointment of official liquidator.]—Although the Court of Appeal will not as a rule interfere with the discretion of the judge in the court below in the appointment of an official liquidator, yet the latter cannot delegate to any other person the appointment of such liquidator. If he does so, *e.g.*, to the chief clerk, and the chief clerk makes an order, the order will be discharged, although no objection can be taken to the fitness of the person appointed (*c*). Chitty, J., in the case cited, directed the chief clerk to appoint the nominee of an independent shareholder, provided certain conditions were fulfilled. Jessell, M. R., having compared such delegation to the appointment of a trustee being delegated by a person, subject to the condition that a fit person shall be nominated, continued: "He might either have asked the independent shareholder to nominate the liquidator then and there, and have approved the nomination—for anybody may suggest to the court who is to be liquidator—or he might have adjourned the matter to give the independent shareholder an opportunity of proposing a liquidator, and then have adopted the proposal."

Exceptions to the rule that an agent cannot appoint a deputy.]—Wherever an agent is expressly authorized to appoint a deputy, whether by the terms of his agency or by an enactment of law, no question arises with regard to his power to delegate his authority, provided the subject-matter of the agency is such as may lawfully be delegated. There are, however, other cases in which it will be lawful for the agent to appoint a deputy. These cases, of course, [★ 53] are exceptions to the maxim, "*Delegata potestas* ★ *non potest delegari*," and may be classed under the following heads.

An agent may *prima facie*, appoint a deputy, and delegate authority to him—

(1.) Whenever he is allowed to do so by a lawful custom or usage;

(2.) Where the act is purely ministerial;

(3.) Where the object of the agency cannot lawfully be attained otherwise;

(4.) Where the principal is aware that his agent will appoint a deputy.

(*a*) See per Blackburn, J., in Whitmore *v.* Smith, 7 H. & N. 513; 31 L. J. Ex. 107.

(*b*) Eades *v.* Williams, 4 De Gex, Mac. & G. 674; Ellison *v.* Bray, 9 L. T. 730.

(*c*) *Re* Great Southern Mysore Gold Mining Co., 48 L. T. 11.

These several exceptions to the general rule will be examined in their order.

Delegation allowed by lawful custom or usage.]—First, then, as to the cases governed by usage and custom. The maxim of the civil law, which has been engrafted into our common law, is "*In contractis tacit insuntè quæ sunt moris et consuetudinis.*" Thus a custom in the case of a builder to employ a surveyor to make out the quantities of a building proposed to be erected has been held valid, so as to make the employers of the builder liable to the surveyor for his work (*d*).[1] Wherever, however, reliance is placed upon a custom or usage of trade, it should be borne in mind that the criterion of the legality or illegality of a custom is supplied by an answer to the question, Does the alleged custom change the intrinsic character of the contract, or does it merely control the mode of the performance? If it changes the intrinsic character of the contract, or if it is inconsistent with the nature of the employment, the custom will not be deemed valid without notice (*e*).

Where the act is ministerial or mechanical.]—Secondly, when an agent is employed to perform ministerial or mechanical, and not judicial, acts, or acts which do not require any exercise of discretion or judgment, in respect of acts other than such as are ministerial he may appoint a deputy (*f*).[2] But if a person is appointed to some function, or selected for some employment, to which peculiar skill is essential—as a painter engaged to paint a portrait—he cannot hand it over to some one else to perform. The objection does not apply where the thing to be done is one ★ which [★ 54] any reasonably competent person can do equally well, or when any discretion to be exercised is in respect of a merely ministerial act. In these latter cases a deputy may be appointed (*g*). Hence, a sexton may delegate the performance of his duties to a deputy (*h*). On the same grounds the overseer of a township may execute by deputy a warrant directed to him to levy a rate (*i*). Sir E. Sugden has summed up the result of the cases relative to the execution of a deed of appointment by the donee of a power by saying that they merely establish that the donee cannot delegate the confidence and discretion reposed in him to another. Whereas, when the deed of appointment is actually prepared, or the donee points out

(*d*) Moon *v.* The Guardians of Witney Union, 3 Bing. N. C. 814.
(*e*) See the elaborate judgment in Robinson *v.* Mullett, L. R., 7 Eng. & Ir. Ap. 802; 44 L. J., C. P. 362.
(*f*) 1 Roll. Abr. 591, "Deputie."
(*g*) *Per* Willes, J., Burial Board of St. Margaret's, Rochester *v.* Thompson, L. R., 6 C. P. 457.
(*h*) *Ibid.*
(*i*) Walsh *v.* Southworth, 6 Ex. 150.

[1] Where a customer gives a broker an order for stock the latter may in accordance with custom, direct his correspondents in another city to purchase the stock. Rosenbrock *v.* Forney, 32 Md. 169.
[2] Williams *v.* Woods, 16 Md. 220; Titus *v.* R. R. Co., 46 N. J. Law, 393. See the cases cited in note 4, page 47, *ante*.

the precise appointment which he is desirous should be made, there no confidence or discretion is delegated (*j*). This is consistent with the principles before stated, if we limit the word discretion to acts other than such as are purely mechanical or ministerial in accordance with what we have said above. An inspector appointed under the Sale of Food and Drugs Act, 1875, may employ a deputy to purchase articles for the purpose of analysis (*k*).

Where the authority requires for its execution the appointment of a deputy.]—As to the third exception, it manifestly proceeds from the ordinary interpretation of the contract of agency, adopted in our courts. The authority of the agent is always construed to include all the necessary and usual means of executing it properly (*l*). Arguing from this principle, which is well established, the conclusion is clearly that wherever the agent can show that instructions of the principal could not be properly carried out except through sub-agents, he will be justified in delegating so much of his authority as the nature of the agency requires (*m*).[1] In *The Quebec and Richmond Railroad Company* v. *Quinn* (*n*), the law is thus stated by the Privy Council: "When the power given by a person is of such a nature as to require its execution by a deputy, the attorney may appoint such deputy." This exception, however, may, as already mentioned, be supported upon broad grounds, the considera- [★ 55] tion ★ of which belongs more properly to an examination of the implied authorities of agents.

Where the principal acquiesces.]—The fourth exception is based upon an assumption of the tacit consent or acquiescence of the principal. "*Semper qui non prohibet pro se intervenire, mandari creditur*," was the maxim of the civil law.

Illustrations of the rule in the case of directors.]—The maxim that delegated power cannot itself be delegated as a matter of course, is as clearly applicable to the authority of directors as to that of any other agents. It might almost be said that it is even more applicable, for directors are in many respects in the position of trustees. In the words of Lord Romilly, directors are persons selected to manage the affairs of a company for the benefit of the shareholders; their office is an office of trust, which, if they undertake, it is their duty to perform fully and entirely (*o*). A reference to some of the more recent cases will suffice to show the application of the principle.

(*j*) Sugden on Powers, 180 (8th ed.).
(*k*) Horder *v.* Scott, 49 L. J., M. C. 78; 42 L. T. 660.
(*l*) Howard *v.* Baillie, 2 H. Bl. 618; Barnett *v.* Lambert, 15 M. & W. 489.
(*m*) See Story on Agency, sect. 14.
(*n*) 12 Moore, P. C. C. 265.
(*o*) York & North Midland Rail. Co. *v.* Hudson, 16 Beav. 491.

[1] Laussatt *v.* Lippincott, 6 S. & R. (Pa.) 386; Bank *v.* McGilway, 4 Gray, 517; Gabens *v.* Bank, 23 Pick. 330; Johnson *v.* Cunningham, 1 Ala. 249; Bank *v.* Bank, 75 N. Car. 534; Warner *v.* Martin, 11 Howard, 209; Harrolson *v.* Stein, 50 Ala. 347; Chase *v.* Astram, 50 Wis. 640; Grady *v.* Insurance Co., 60 Mo. 116.

In Howard's case (*p*) the power of allotting shares was, by the deed of settlement, vested in the directors of a company. A shareholder having been offered some reserved shares, accepted them conditionally. This conditional acceptance was not expressly assented to by the board of directors, but they made a resolution that the shares undisposed of should be allotted at the discretion of two of the directors and the manager. Some time afterwards the manager informed the shareholder that the shares he had accepted had been allotted to him. This was on the 22nd July, 1864. The company was ordered to be wound up in October of the same year. No payment had been made by the shareholder in respect of his new shares. He applied to the court to have his name removed from the list in respect of such shares, and the Lords Justices, coinciding with the decision of Vice-Chancellor Kindersley, granted the application. Several reasons were given for this decision; but that with which we are concerned is contained in the judgment of the latter. "Then arises the question," said the learned Vice-Chancellor, "whether the board of directors had power to delegate the allotment of shares to the manager and two private directors. I think they had no such power, and that the rule, *Delegatus non potest delegare*, applies. Mr. H. could not file a bill for specific performance ★ against the company in respect to these shares; [★ 56] for the answer to such a bill would have been that the company never authorized the manager and the two private directors to allot the shares, but only authorized the board of directors to do so." One of the most recent cases in which the principle was examined was decided in 1874 (*q*). The articles of association expressly empowered the directors of a company to buy shares in the company as well as to appoint a general manager. After the appointment of the manager, he agreed to buy for the company the shares held by one of the shareholders. The latter executed a transfer of his shares to two directors who were trustees for the company, but who did not execute the transfer themselves. The transfer was duly registered. The court was of opinion upon these facts that the directors had no authority to delegate the power to buy shares, inasmuch as they could not delegate those powers which they would not have had except under the provisions in the articles. But the court was further of opinion that there had been no attempt to delegate the power. In cases of this kind it is not unusual to contend that the directors are estopped from saying that the company did not enter into the contract (*r*). This appears frequently to arise from a misapprehension of the principle of the decision in *Royal British Bank* v. *Turquand* (*s*). The principle is that incorporated companies differ from partnerships in that persons deal-

(*p*) L. R., 1 Ch. 561.
(*q*) Cartmell's case, 31 L. T. Rep., N. S. 52; L. R., 9 Ch. 691.
(*r*) See per Sir G. Mellish, J., in Cartmell's case, *supra*.
(*s*) 6 E. & B. 327; 25 L. J., Q. B. 317, in error.

ing with the former are bound to read the statute and the deed of settlement, and thereby learn what powers are possessed by authorized agents (*t*).

Delegation of powers conferred by the legislature.]—The stringency with which courts of equity carried out the principle forbidding a delegation of delegated power on grounds of public policy, was well illustrated in *The Great Northern Railway Company* v. *The Eastern Counties Railway Companies* (*u*). The plaintiffs applied for an injunction to restrain the defendants from preventing the engines of the former company passing over the line between the junction of the latter company's railway with that of another company. The plaintiff's right was based upon two grounds,—[★57] the terms of the general railway acts, and an ★ agreement by which the defendants granted to the plaintiffs the right to pass to and fro over the line in question. But the agreement went further, in the opinion of the learned judge, Vice-Chancellor Turner, and amounted to an entire delegation to the plaintiffs of all the powers conferred by parliament upon the defendants. In his opinion, it was an attempt to carry into effect, without the intervention of parliament, what could not lawfully be done except by parliament, in the exercise of its discretion with reference to the interest of the public. The motion was refused. This case, however, and others of the same kind, is more properly cited as an authority in support of the rule that one corporation cannot transfer to another their own powers and privileges unless duly authorized to do so (*x*). It is cited in this place as an instance of the effect of violating public policy in attempting to delegate an authority.

The Companies Act, 1862.]—The powers of delegation enjoyed by the directors of companies formed under the Companies Act of 1862 are expressed in Schedule I. 68 of that act. The directors are there empowered to delegate any of their powers to committees consisting of such member or members of their body as they think fit; and any committees so formed must, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors. When one or two directors act in any matter properly within the ordinary business of the company, a delegated authority will be presumed (*y*). On the other hand, a company may modify or altogether exclude the operation of this section by its articles of association. Accordingly where, as in *Cartmell's Case*, a company's articles excluded Table A of the Schedule, and empowered the directors to purchase on behalf of the company shares in the company, this was held to be a power which the general mana-

(*t*) See Totterdell *v.* The Fareham Blue Brick and Tile Co. (Limited), L. R., 1 C. P. 674.

(*u*) 21 L. J., Ch. 837.

(*x*) See Beman *v.* Rufford, 20 L. J., Ch. 537; 1 Sim., N. S. 550; London, Brighton & South Coast Rail. Co. *v.* London & South-Western Rail. Co., 28 L. J., Ch. 521.

(*y*) Totterdale *v.* Fareham Brick Co., L. R., 1 C. P. 674.

ger of the company, unauthorized for that purpose, could not exercise; nor apparently could he have exercised it even if the directors had purported to give him authority to do so.

Liquidators of a Company.]—The powers of liquidators cannot as a rule be delegated (*z*).

(*z*) See *Ex parte* London & S. W. Bank, 36 L. J., Ch. 807 ; *Ex parte* Birmingham Banking Co., L. R., 3 Ch. 651 ; *Ex parte* Agra & Masterman's Bank, L. R., 6 Ch. 206 ; Bolognesis' Case (5 *ib.*, 567), and *Re* Metropolitan Bank and Jones, 2 Ch. Div. 366.

[★58]

★CHAPTER VII.

THE DOCTRINE OF RATIFICATION.

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SECT. 1.—*Of the Essentials of Ratification.*

Ratification defined—Conditions and effect of ratification.]—To ratify is to give sanction and validity to something done without authority by one individual on behalf of another. "*Ratificare*,"

says Lord Coke, "*est ratum facere* and is *æquipollent* to *con-* [★ 59] *firmare*, which is *firmum facere*" (*a*). After ratification the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority (*b*). But there can be no valid ratification unless certain conditions have been fulfilled. These conditions refer (1) to the act done, (2) to the conduct of the agent, (3) to the powers of the person who assumes to ratify, (4) to the knowledge of the principal, and (5) sometimes to the form of the contract waiting ratification.

The act to be ratified must be voidable and not void.]—With respect to the act, the general rule is that the act must not be void (*c*), for only defeasible or voidable acts can be ratified (*d*), and a confirmation of what is void avails nothing.[1] Thus, it is said, if B. takes from another his villein in gross, who confirms to B. his estate in his villein, it is of no avail, for B. had no estate in him (*e*). All authorities agree that the act must not be void, but there has not been the same unanimity in determining what acts are void.

No ratification of an indictable offence—Cases in which the doctrine has no application.]—Two rules may be laid down with certainty. In the first place, there can be no ratification of an indictable offence, or an offence against public policy; in the second place, the doctrine of ratification is only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the meantime depend on whether there be a subsequent ratification (*f*). The rules which determine whether an act is void or not for the purposes of ratification have been summed up by a learned writer in terms consistent with the above statement of the law in *Right* d. *Fisher* v. *Cuthell*. Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but remains simply to the assertion of a right on the part of the principal, the maxim "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" ap-

(*a*) Co. Litt. 295c.
(*b*) Wilson *v.* Tummon, 6 M. & Gr. 242.
(*c*) See per Lord Romilly, in Spackman *v.* Evans, L. R., 3 H. L. 171, 244.
(*d*) Gilb. Ten. 75.
(*e*) Litt. s. 541.
(*f*) Per Lawrence, J., in Right d. Fisher *v.* Cuthell, 5 East, 499.

[1] Shisler *v.* Vandike, 92 Pa. St. 447; McHugh *v.* Schuylkill, 67 Pa. St. 391; Richardson *v.* Payne, 114 Mass. 429; Sceery *v.* Springfield, 112 Mass. 512. A., an attorney-at-law, was authorized to collect an account. B., a person who occupied the same office with A., but had no business connection with him, received from the debtor a certain sum as part payment of the account, and gave a receipt for same, signed by him as for said attorney. Held that such an act on the part of B. could not be ratified and was void. A. had not the power to delegate his authority and so was unable to ratify an act which he could not authorize. O'Conner *v.* Arnold, 53 Ind. 203. An infant cannot ratify an act done for him by an agent or attorney. Armitage *v.* Widoe, 36 Mich. 124.

plies. But if the act done by such person would, if unauthorized, [★ 60] ★ create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third persons to the consequences (*g*). Lord Romilly, in the above-cited case, distinguishes between void and voidable transactions, by assuming as a cardinal rule that whenever the validity of an irregular transaction depends on the confirmation of one or more persons, that transaction is voidable only and not void.

In *Brook* v. *Hook* (*h*), J. forged the defendant's name to a promissory note, which purported to be made in favour of the plaintiff. During the currency of the note the defendant signed a memorandum in the following terms in order to prevent the prosecution of the forger: "I hold myself responsible for a bill dated the 7th November, 1869, for 20*l*., bearing my signature." He denied that the note was signed by his authority. An action was brought on the note, and the judge ruled that the memorandum was a ratification. This opinion was reversed by the Court of Exchequer, on the ground, amongst others, that the memorandum could not be construed as a ratification, since the act it was assumed to ratify was illegal and void, and that the memorandum was against public policy, as founded upon an illegal consideration.[1] Martin, B., who

(*g*) See Story on Agency, sects. 245, 246.
(*h*) L. R., 6 Ex. 89.

[1] McHugh *v.* County of Schuylkill, 67 Pa. St. 391, followed in Shisler *v.* Vandyke, 92 Pa. St. 447, in which Judge Gordon said "There (McHugh *v.* Schuylkill) as here, the question was whether there could be an after ratification of a forged instrument, and it was held that there could be no such ratification. It is true, the dicta of this case, going as they do beyond the point ruled, would indicate that no contract vitiated by fraud of any kind, is the subject of subsequent ratification. But this cannot be sustained, as it is opposed to those decisions now regarded as law, notably, Pearsoll *v.* Chapin, 8 Wright 9, and Nagley *v.* Lindsey, 17 P. F. Smith, 217.

The distinction between these cases seems to be this, where the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence, cannot be permitted, but where the transaction is contrary only to good faith and fair dealing; where it affects individual interests and nothing else, ratification is allowable. It is indeed conceded in the cases last above cited, that if the original contract be illegal, or void for want of consideration no subsequent ratification will help it.

If, however, the endorsement under consideration was forged it was not only void for want of authority, but it was also illegal, and so comes under the condemnation of all authority."

When the apparent maker of a note by acts or words, induces the holder thereof to believe the note to be genuine, he will be estopped from denying his liability thereon, on the ground that it has been forged, if the holder, acting upon such belief, suffers damage or neglects to enforce a remedy he might have had against any other party. Forsyth *v.* Day, 46 Me. 176; Greenfield Bank *v.* Crafts, 4 Allen, Mass. 447; Livings *v.* Wiler, 32 Illi. 387; Union

dissented from this view, appears to have been of opinion that the nature of an act, that is, whether it is void or voidable, for the purposes of ratification, should be determined simply by a reference to the nature of the act or contract itself, and not by the criminal liability incurred by a feigned agent in doing the act. This view, however, did not prevail, nor is it free from the objection that its adoption might be made a means of shielding criminals and compounding felonies.

In *Right* v. *Cuthell* (*i*), decided in 1804, A. took a lease for twenty-one years, which lease contained a proviso that in case either party wished to put an end to the term at the expiration of the first seven or fourteen years, six months' previous notice in writing should be given under his or their respective hands. A notice to quit, signed by two only of three executors of the ★ lessor, who were [★ 61] joint tenants of the land, and given on behalf of themselves and the third executor, was held incapable of ratification by reason of the above proviso requiring the signature of the three executors. Lord Ellenborough considered that ratification would not avail in this case, because the tenant was entitled to such notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third covenanter chose to ratify the act of his companions or not before the six months elapsed.

In a subsequent case (*k*) ejectment was brought against the defendant, a tenant from year to year, who held of several lessors, Notice had been given him by one K., and purported to be signed by him on their behalf. In proof of the agent's authority to give the notice, a paper was produced, from which it appeared that at the time the notice was served the authority to the agent had only been signed by part of the trustees, though the others signed it afterwards. It was held by Abbott, C. J., that *Right* v. *Cuthell* (*l*) did not apply, since the defendant, having received notice to quit, purporting to be given on the part of all the lessors of the plaintiffs,

(*i*) 5 East, 491.
(*k*) Goodtitle *v.* Woodward, 3 B. & Ald. 689.
(*l*) *Supra.*

Bank *v.* Middlebrook, 33 Conn. 95; Fitzpatrick *v.* School Commissioners, 7 Humphrey (Tenn.), 224; Rudd *v.* Matthews, 79 Ky. 479.

In the absence of a new consideration or circumstance creating an estoppel against the promissor, a mere promise on the part of one whose name has been forged to a note, will not make him liable on it. Workeman *v.* Wright, 33 Ohio St. 405; Owsley *v.* Phillips, 78 Ky. 517.

If one whose name has been forged to a note as surety, upon inspection of the note, admits the signature to be his, he becomes liable thereon, after such admission he is estopped from denying the making of the note. Hefner *v.* Vandolah, 62 Illi. 483.

In Garrett *v.* Gauter, 42 Pa. St. 143, the act of an attorney in executing a mortgage under a forged power of attorney was allowed to be ratified. On the subject of ratification of forged deeds, see, also, Ladd *v.* Hilderbrant, 27 Wis. 135 S. C. 9 Amer. Rep. 445.

had such a notice as he could act upon with certainty at the time it was given. This is certainly inconsistent with *Right* v. *Cuthell*, unless we assume that the *ratio decidendi* was based upon the mode specifically pointed out in order to put an end to a subsisting term. However, it was distinctly decided by the same learned judge, when Lord Tenterden, that as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to a tenancy.

The two last cases were reviewed in *Doe* v. *Walters*(*m*), which was decided in 1830. This was an action of ejectment. The decision in this case also turned upon the validity of a notice to quit. The landlord's general agent gave the notice without special authority, and it was held that the mere fact that the landlord brought an action of ejectment upon the notice was not such a ratification of the unauthorized act as to give it the authority of a previous command.

Application of the doctrine to joint stock companies.]—The doctrine of ratification has been applied to joint stock companies (*n*), [★ 62] but it cannot be said that it is yet settled what acts ★ are void and what voidable. The question, What acts which are *ultra vires* may be ratified? is not yet definitely settled. In all the above three cases it was taken for granted that the contracts then under consideration, though *ultra vires* of the directors, might have been ratified with the assent of all the shareholders, since they were not expressly or impliedly prohibited by the conditions upon which the company was originally constituted. In *Spackman* v. *Evans*, (*o*), Lord Romilly summarizes the law as follows: "The result of the cases may stated to be that the directors are the agents of the company, that the company are not bound by any acts done by them for objects which the company has no power to entertain, and that these are the only acts which, if the directors do, are *ipso facto* void. But that not only do the acts of the directors bind the company when done within the scope of their authority, but also that where the acts of the directors, however irregular, belong to a class of acts, which class is authorized by the deed of settlement, in these cases the company is absolutely bound when the acts are done with strangers who act *bonâ fide* with the company; and when these acts are done with the shareholders of the company, then that these acts are voidable only, and that the other shareholders must take active steps to set aside the transaction, and that when there is no dishonesty, time bars the action."

Ratification by shareholders of a contract ultra vires.]—The decision of the House of Lords in *The Ashbury Railway Carriage Iron Company (Limited)* v. *Riche* (*p*), has set at rest a fundamental

(*m*) 10 B. & C. 626.
(*n*) See Evans *v.* Smallcombe, L. R., 3 H. L. 249; Spackman *v.* Evans, *ibid.* 171; Houldsworth *v.* Evans, *ibid.* 263.
(*o*) *Supra.*
(*p*) L. R., 7 H. L. 653.

questions in the principles of ratification applicable to limited companies incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). The object of the company, which was incorporated under the above act, was stated in the memorandum of association to be as follows: "To make, sell, or lend or hire . . . all kinds of railway plant . . . to carry on the business of mechanical engineers and general contractors." The directors of the company agreed to employ Riche to construct a railway in Belgium, upon terms stated. This contract was repudiated by the company subsequently, though not until the shareholders had done certain acts, not necessary to be stated here, which raised the question of ratification. In the Court of Exchequer it was held by all the learned judges that the contract was *ultra* ★ *vires*, and the majority further held [★ 63] that the contract had been ratified by the shareholders. On appeal to the Court of Exchequer Chamber, it was unanimously held that the transaction was beyond the scope of the memorandum of association, and therefore *ultra vires*, but the court was equally divided upon the capability of such a contract to be ratified. The opinion of the majority in the court below was upheld by Blackburn, Brett and Grove, JJ.; Keating, Archibald, and Quain, JJ., thought the contract was not capable of being ratified. Blackburn, J., who delivered the opinion of the former, adopted the statement of the law by Channell, B., in the court below. "Whatever may be the case with regard to companies which have been specially incorporated by parliament for special purposes, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company—that is to say, the shareholders—may bind themselves in their corporate capacity, by their individual assent to contracts not authorized by the memorandum of association, or other like institutions by which the company is defined. The objection to such a contract is not that it is illegal, and, therefore, unenforcible, but simply that it is unauthorized by the company whom it purports to bind." Blackburn, J., also recognized a twofold source of the powers enjoyed by a corporation, the one traceable to a statute, the other to the common law (*q*). In the House of Lords the subject was fully and lucidly discussed. Speaking of the objects of the provisions under which joint-stock companies with a limited liability were incorporated, Lord Chancellor Cairns observed that the provisions were "not merely for the benefit of the shareholders for the time being of the company, but were also intended to provide for the interests of two other very important bodies. In the first place, those who might become shareholders in succession to the shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind." His

(*q*) See Coke Inst., ii. 200.

lordship disposed of the contention in favour of the twofold source of the rights of corporations by descibing the memorandum of association as "the charter and the limitation of the powers of any [★ 64] company ★ established under the act." It is important, too, to remember that the articles of association play a part subsidiary to the memorandum. They can give no authority unauthorized by the latter. "The memorandum of association," said Lord Cairns, "is, as it were, the area beyond which the action of the company cannot go, but inside that area they may make such regulations for their own government as they think fit." This being the opinion of the House of Lords, the conclusion is obvious. "I assume the contract in itself to be perfectly legal," said his lordship; "to have nothing in it obnoxious to any of the powers involved in the expressions which I have used. The question is not the illegality of the contract, but the competency and power of the company to make the contract. I am of the opinion that this contract was entirely beyond the object of the memorandum of association, If so, it was thereby placed beyond the power of the company to make the contract. If so, it was not a question whether the contract ever was ratified or not ratified. If it was a contract void at its beginning, it was void for this reason, because the company could not make the contract." Thus, by the application of the familiar principle of our law that no void act can be ratified, the respondent's claim against the company was declared invalid. Putting aside altogether the question raised respecting the sufficiency of the evidence of a ratification, there can be no doubt that the enunciation of the law by the House of Lords is more logical, as well as more reconcilable with general principles, than the decision of the courts below.

No ratification effectual unless the agent acts on behalf of person who ratifies.]—We now proceed to inquire what circumstances in the conduct of an agent are necessary in order to make a ratification of such conduct equivalent to a previous command. And here it will be most convenient to consider the conduct of the person who assumes to act as agent (1) in doing the act or entering into the contract, and (2) in obtaining a ratification. In the former case the rule is long established that no ratification is effectual unless the act has been done by the agent on behalf of the person who ratifies.[1] This is distinctly laid down in the Year Book, 7 Hen. 4, fo. 35. Thus, if a bailiff take a heriot, claiming property in it himself, the subsequent assent of the lord would not amount to a

[1] Waterson *v.* Rogers, 21 Kan. 529; Crowder *v.* Redd, 80 Md. 1; Brainerd *v.* Dunning, 30 N. Y. 211; Fellows *v.* The Commissioners, 36 Barb. (N. Y.) 665; Grund *v.* Van Vleck, 69 Illi. 478, where it was held that the subsequent approval of a trespass by a third person will not make him liable if the trespass was not done in his name or for his use.

A contract of sale made by an agent of the owner, but which does not show that the party to the contract was such agent, cannot be enforced by the owner; Roby *v.* Cossitt, 78, Illi. 638.

ratification; but if he take it as the bailiff of the lord, the subsequent assent amounts to a ratification ★of the bailiff's [★ 65] act (*r*). The same rule applies when a person distrains without authority (*s*). The learned reporters of *Wilson* v. *Tumman* (*t*), in discussing this principle of s. 35 in the Year Book of 7 Hen. 4, refer to one of the *regulæ juris*, appended by Gregory IX. and Boniface VIII. to the Decretals, as embodying the same principle. The rule here referred to is as follows: *Ratum quis habere non potest, quod ipsius nomine non est gestum.*

Wilson *v.* Tumman *examined.*]—A leading case upon this question was decided by the Court of Common Pleas in the year 1843 (*u*). This was an action of trespass *de bonus asportdtis.* N. assigned certain goods to W., who took possession of them. Shortly after the assignment the sheriff's officers seized and carried them away under a process directed to the sheriff in respect of a debt due from N. to T. The seizure was not authorized by T., nor did the sheriff's officers assume to act as his agents. T. subsequently acquiesced in the seizure, and claimed the goods in opposition to W.'s claim. At the trial he learned judge (Parke B.) directed the jury that an order to seize the goods was here necessary to make the defendant liable; that although the subsequent assent and ratification by B. of an act done by A., professing to act for and on account of B., is sufficient to make that act the act of B. by relation, here the sheriff's officers acted as ministers of the law, without any intention to act as agents of the party suing out the process. This ruling was upheld in the Court of Common Pleas: "That an act done for another," says Chief Justice Tindal, "by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the plaintiff if subsequently ratified by him, is the known and well-established rule of law." Having referred to the distinctions adopted in the Year Book, 7 Hen. 4, c. 35, his lordship proceeds, "but when the sheriff, acting under a valid writ by the command of the court, and as a servant of the court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking and make it a wrongful taking by the plaintiff in the original action." The principles here enunciated are so clear and so well established that it will suffice, by way of illustration, ★to make but a short reference to [★ 66] two subsequent cases in which they have been recognized.

In *Ancona* v. *Marks* (*x*), decided in the Court of Exchequer in 1862, W., the holder of certain bills of exchange, acting without

(*r*) Year Book, 7 Hen. 4, fo. 35.
(*s*) Godbolt's Rep. 1096.
(*t*) 6 M. & G. 236.
(*u*) Wilson *v.* Tumman, *supra.*
(*x*) 7 H. & N. 686.

the authority or knowledge of the plaintiff, indorsed and delivered them to an attorney, saying, "I wish you to receive these bills for Ancona, and to bring an action upon them in his name." After action brought, the plaintiff assented to the act, and it was held a valid ratification. It is immaterial, therefore, whether the principal knows at the time his name is assumed that it is so assumed; and it is equally immaterial whether the ratification is antecedent or subsequent to action brought.

Watson v. *Swann* (*y*), a decision of the Court of Common Pleas in the same year, is another authority in support of the same principle. The plaintiff had given instructions to an insurance broker at Hull to effect an open policy for 5,000*l.* against jettison only "subject to declaration thereafter." The broker was unable to do so. He therefore declared a cargo shipped for Ostend on board one of the plaintiff's vessels. The declaration was made on the back of a general policy which he had effected for himself, upon any kind of merchandise, as interest might appear. This was initialled by the underwriters. A loss by jettison happened, and it was held, on the ground that the contract had been made neither by the plaintiff nor by an agent professing to act for him, that the plaintiff could not maintain an action against the underwriters upon the policy. The obvious consequence if the plaintiff had succeeded would be to give a man a right to sue upon a contract which was not made by him or on his behalf.

With respect to the conduct of the agent in obtaining a ratification, see what is said in regard to the knowledge of the plaintiff *infra*.

There can be no ratification except by a person ascertained at the date of the act—Illustrations—Ratification by stranger.]—With respect to the individual who undertakes to ratify the act of another, it is well established that there can be no ratification except by a person ascertained at the time of the act done, that is, by a person who was at the time the act was done in existence either actually [★ 67] or in contemplation of law.[1] *Kelner* v. *Baxter* (*z*), ★decided in 1866, is one of the most recent authorities upon the subject. The plaintiff, a wine merchant and owner of an assembly room, sold to certain of the directors of a projected hotel company, and the directors agreed to purchase, on behalf of the company, the extra stock on the plaintiff's premises. The stock was accordingly received by the company, and consumed in the business of the hotel. A few days after the purchase, the directors met and passed a resolution that the arrangement entered into by the defendants on behalf of the company for the purchase of stock was thereby ratified. There was also a subsequent ratification by the company.

(*y*) 11 C. B., N. S. 756.
(*z*) L. R., 2 C. P. 174.

[1] Marchand *v.* Loan & P. Association, 26 La. An. 389; Stainsley *v.* Frazier M. L. Boat Co., 3 Daly (N. Y.), 98.

The articles of association were not duly stamped, nor had the company obtained a certificate of incorporation when the above agreement was entered into between the plaintiff and defendants. At the trial a verdict was entered for the plaintiff, subject to leave reserved to the defendants to move to enter a nonsuit, and for a new trial on the ground of misdirection on the part of the learned judge "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability." The court refused to grant a rule. The reasoning in the judgment of Chief Justice Erle is a clear exposition of the law. Having pointed out that if the company had been in existence at the time the contract was entered into there would be no doubt that the defendants would have signed as agents, his lordship proceeds to consider the effect of the subsequent incorporation of the company and its recognition of the defendants' acts. "As there was no company in existence at the time of the agreement being made, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility." The reason of the rule cannot be better expressed than in the words of the same learned judge: "When afterwards the company came into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once indeed thought that ★an inchoate liability [★ 68] might be incurred on behalf of a proposed company which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made." That no contract is valid unless there are parties existing at the time who are capable of contracting, is an elementary principle of the law of contracts (*a*). To this principle the rule which makes the validity of a ratification depend upon the existence of the person who ratifies, appears manifestly to be corollary (*b*).

Power of a company to adopt contracts made by its promoters—Conflict between decisions at law and in equity.]—The decision in the case of *Kelner* v. *Baxter* (*c*), so far as that decision is an au-

(*a*) See Gunn *v.* London & Lancashire Fire Insurance Co., 12 C. B., N. S. 694.
(*b*) See Cullen *v.* Duke of Queensberry, 1 Bro. C. C. 101; Payne *v.* New South Wales Coal, &c. Co., 10 Ex. 283; Higgins *v.* Senior, 8 M. & W. 834.
(*c*) L. R., 2 C. P. 174.

thority for the principle that a company cannot adopt the contracts of its promoters before the formation of the company, must be considered rather as an exposition of the doctrines of the common law than as an authority binding in equity. In *Melhado* v. *The Porto, &c. Railway Co.* (*d*), which was decided in the year 1874, the action was brought by the promoters of the defendant company for preliminary expenses incurred in the establishment of the company. The articles of association of the defendants, a joint stock company, provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses to an amount not exceeding 2,000*l.*

Lord Coleridge, C. J., said, "I am of opinion that the defendants are entitled to our judgment . . . The declaration avers that all conditions were performed necessary to entitle the plaintiffs to be paid their expenses ; and, therefore, I think we must take it that they were expenses which, if the directors had thought proper to pay them, the articles would have justified them in paying. The question, therefore, is whether an action will lie for the payment of these expenses, in pursuance of the articles of association, to which the plaintiffs were not parties. I have come to the conclusion that [★ 69] no such action will lie. ★ I must say, somewhat reluctantly, because, though I wish to express no opinion on the merits of this particular case, having no material for forming such an opinion, it does seem just, in general, if a company takes the benefit of the work and expenditure by which its existence has been rendered possible, and voluntarily comes into existence on the terms that it shall be liable to pay for such work and expenditure, that a cause of action should be given.[1] I can find, however, no legal principle upon which such an action can be maintained." His Lordship was of opinion that there was no contract, and that the doctrine of ratification was inapplicable for the reason given in *Kelner* v. *Baxter*. "The articles," continued his lordship, "no doubt would be a valid authority to the directors if they had chosen to pay these expenses ; but I do not think that any contract, express or implied, arises as between the defendants and the plaintiffs to pay them." With respect to certain cases in equity, cited in the course of the argument, he observed, "There are, it is true, certain decisions in equity upon

(*d*) L. R., 9 C. P. 503.

[1] Where the majority of a number of persons, not incorporated, but intending to procure a charter, authorizes one of their number to do acts in furtherance of their object and which are necessary to the organization and are accepted by the corporation and the benefits enjoyed, such acts must be compensated for by the corporation.

A minority of the promoters of the enterprise cannot so bind the corporation. Bell's Gap R. R. *v.* Christy, 79 Pa. St. 54 ; Grape Sugar Mfg. Co. *v.* Small, 40 Md. 395 ; Whitney *v.* Wyman, 11 Otto (U. S.), 392. On this subject see, also, Franklin Fire Ins. Co. *v.* Hart, 31 Md. 59 ; R. R. *v.* Sage, 65 Ill. 328 ; Western Screw & Mfg. Co. *v.* Consley, 72 Illi. 531.

cases, the facts of which are not in substance dissimilar from those of the present case, in which the plaintiff has been held entitled to recover, such as *Touche* v. *Metropolitan Railway Warehousing Co.*(*e*); but the principle upon which they proceed is not one which we can apply. It seems to me that the judgment of Lord Hatherley in that case, and that of Vice-Chancellor Wigram in *Spooner* v. *Parsons* (*f*), are based upon the doctrines which, in courts of equity, govern the relation of trustee and *cestui que trust*, and which, however sound and reasonable they may be, we cannot, as a court of law, adopt in relation to the question now before us." To the same effect it was said by Mellor, J., "I think we should be stretching the rules of law very much if we were to hold that, under the circumstances disclosed on this declaration, there would be an implied contract on the part of the company to pay preliminary expenses. Judgment was entered for the defendants.

In *Parsons* v. *Spooner* (*f*), a solicitor who had projected and, at his own expense, brought forward a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the undertaking, that the costs and expenses should be paid by such solicitor and ★ pro- [★ 70] jector, and that the members of such provisional committee should not be personally liable to him for such costs and disbursements, but that the same should be paid out of the fund to arise from the deposits to be paid on the shares. Wigram, V.-C, held that this agreement was not illegal as between the provisional committee and the shareholders, regarded as trustee and *cestui que trust*, inasmuch as the trustee was entitled to be indemnified by his *cestui que trust* in respect of the costs and expenses properly incurred.

Touche v. *Metropolitan, &c., Co.* (*h*), was decided after *Kelner* v. *Baxter*, in 1871. The plaintiffs had incurred labour and expense in organizing a scheme for certain exhibition rooms, and had entered into negotiations with, and sent the plans to, some of the promoters of a company, offering to accept 2,000*l.* for remuneration. In the articles of association, it was subsequently provided that when the shares were subscribed for and paid up to an amount named, the directors should pay the above sum of 2,000*l.* The amount named was obtained, but the company failed to obtain a site, and never actually commenced business. Lord Hatherley, C., held that the company had adopted the agreement as to the payment of 2,000*l.*, and that the plaintiffs could maintain a suit against the company and the directors.

Vice-Chancellor Malins, in deciding the case of *Spiller* v. *Paris Skating Rink Co.* (*i*), which came before him in 1878, insisted

(*e*) L. R., 6 Ch. 671.
(*f*) 5 Hare, 102.
(*h*) L. R. 6 Ch. 671.
(*i*) 7 Ch. Div. 368.

strongly upon the distinctions prevailing between the principles of common law and those of equity. "It is argued," said his lordship, "that a contract entered into between certain individuals before a company is formed cannot be binding on the company when formed. But here the question is whether such a contract cannot be adopted by the company when formed. To deny this is to argue against a long current of authorities in this court. In *Touche* v. *Metropolitan, &c., Co.* there was a contract, certainly not at first binding on the company, but it was adopted and ratified by the company, and was held by Lord Hatherley to be binding on them. Certain cases at law have been referred to, but *Kelner* v. *Baxter* has no application, for the only point decided in that case was that the persons who had made the contract were liable on it, and could not [★ 71] shift the ★ burden over to the company. Great stress was laid on *Melhado* v. *Porto, &c., Co.;* but there Lord Coleridge himself says that the decisions at law and in equity are different, and I feel no doubt that that case would have been otherwise decided in equity. Lord Coleridge says that the case of *Touche* v. *Metropolitan, &c., Co.* rested upon the principle of trustee and *cestui que trust:* but in my opinion it rested on no such principle, but on the power of a company to adopt contracts made by its promoters after its formation" (*k*).

Statement of the law by the Court of Appeal.]—The above case was considered by the Court of Appeal in *Re The Empress Engineering Co.* (*l*), where James, L. J., said, "Notwithstanding what was said by Malins, V.-C., in *Spiller* v. *The Paris Skating Rink Co.*, it appears to me that it is settled, both in the courts of law and by us in the Court of Appeal in that case (*m*), that a company cannot ratify a contract made on its behalf before it came into existence—cannot ratify a nullity. The only thing that results from what is called ratification or adoption of such a contract is not the ratification or adoption of a contract *qua* contract, but the creation of an equitable liability depending upon equitable grounds." In *The Empress Engineering case* the promoters of a company, before the formation of the company, agreed to pay solicitors a sum for their costs and charges in registering the company. The agreement was adopted in the memorandum of association, and ratified by the directors. A compulsory order for winding-up the company having been made, the Court of the County Palatine held that there was no contract binding the company to pay the solicitors' claim. The Court of Appeal affirmed the decision, without prejudice to any equitable claim on a *quantum meruit.*

Restoration of a title by ratification—when impossible.]—Where the agent of the person last seised of an estate continues in possession and receives the rents, purporting to act on behalf of the true

(*k*) See *In re* Hereford, &c., Co., 2 Ch. Div. 621.
(*l*) L. R., 16 Ch. D. 125; 43 L. T. 742.
(*m*) Hereford & South Wales Waggon and Engineering Co., 2 Ch. Div. 621.

heir, the heir cannot, after the statutory period of limitation has elapsed, ratify the acts of the agent so as to make the agent's possession his own. A title which has been extinguished by Statutes of Limitation cannot be restored by ratification (*n*).

★ *Further questions to be considered.*]—Having pointed [★ 72] out what acts are capable of a ratification; what are the rules by whose observance an authorized agent may put himself in a position to be relieved of the responsibility arising from a contract or tort; and, thirdly, the time when the authority of the person who assumes to ratify must be in existence, we pass on to the remaining questions connected with the essentials of ratification. These questions relate, first, to the amount of knowledge which it is necessary the principal should have in order to make his ratification binding upon it; and secondly, to the necessity in certain cases that the ratification should be made in a form prescribed by the law.

What knowledge requisite to make a ratification binding.]—First, as to the knowledge of the principal. The principle of the cases in this particular is that a ratification becomes binding if made with a knowledge of all material circumstances, or if made with an intention to assume the risk without inquiry (*o*).[1] One of the earliest reported cases in which the principle was recognized was tried at the Guildhall Sittings in 1786 (*p*). The plaintiffs brought an action against the defendants, their correspondents, for neglecting to insure. On receiving the order the defendants sent their broker, A., to Lloyd's to affect the insurance. Failing to insure there, they insured through G. and Co. A loss occurred, and payment made by the underwriter to G. and Co., who, however, refused to meet the claims of their principals. Meanwhile one of the plaintiffs, before whom the defendants laid all the circumstances of the transaction, approved of the conduct of the defendants, took up the affair, and treated A. as his agent, and it was held that he had ratified the conduct of the defendants. "If," said Mr. Justice Buller, "with a knowledge of all the circumstances, he adopted the defendants' acts for a moment, he ought to be bound by them. If he

(*n*) Lyell *v.* Kennedy, 56 L. J., Q. B. D. 303; and see Lord Audley *v.* Pollard, Cro. Eliz. 561.

(*o*) Lewis *v.* Read, 13 M. & W. 834; Eastern Counties Rail. Co. *v.* Broom, 6 Ex. 314.

(*p*) Smith *v.* Cadogan, 2 T. R. 188, n.

[1] Baldwin *v.* Burrows, 47 N. Y. 199; Ritch *v.* Smith, 82 N. Y. 627; Seymour *v.* Wyckoff, 10 N. Y. 213: Combs *v.* Scott, 12 Allen 493; Thacher *v.* Pray, 113 Mass. 291; Lester *v.* Kinne, 37 Conn. 9; Kerr *v.* Sharp, 83 Ill. 199; Proctor *v.* Tows, 115 Ill. 138; Bannon *v.* Warfield, 42 Md. 22; Bryant *v.* Moore, 26 Me. 84; Hovey *v.* Brown, 59 N. H. 114; Dean *v.* Bassett, 57 Cal. 640; Roberts *v.* Rumley, 58 Iowa 301; Dodge *v.* McDonnell, 14 Wis. 553; Turner *v.* Wilcox, 5 Ga. 593; Spooner *v.* Thompson, 48 Vt. 259; Rusby *v.* N. Amer. Life Insurance Co., 40 Md. 572; S. C. 17 Amer. Rep. 634; Wright *v.* Burbank, 64 Pa. St. 247.

And the party must know that he would not be bound without such ratification. R. R. *v.* Gazzan, 32 Pa. St. 340.

had intended to insist on his right to recover the money from the defendants he should never have looked to others at all. But afterwards, when G. and Co. were likely to fail, then he considered the defendants as his debtor. In *Lewis* v. *Read* (*q*), decided in 1845, certain bailiffs were authorized by the landlord to distrain for rent. [★ 73] They were instructed to take nothing but ★ what was on the demised premises. They, however, seized some cattle beyond the boundaries. The cattle were sold, and the proceeds handed over to the landlord Upon an action in trover being brought against the landlord, it was held by the Court of Exchequer that, inasmuch as the authority was not followed, the defendant could not be liable unless he ratified the act of the bailiffs, with knowledge that they took the cattle beyond the boundaries, "or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed, and to adopt all their acts" (*r*). The above rules need not be dwelt upon at any length. The authorities are uniform in recognizing them (*s*). The fact that a railway company is the principal is immaterial (*t*). In *Freeman* v. *Rosher* (*u*), the defendant had received no information about the making of the distress; the only evidence against him was the warrant and the receipt of the proceeds without notice (*v*).

Ratification of contracts made on behalf of companies.]—With respect to companies, the rules have been stated by a learned judge in clear and concise terms. Ratification by directors can be of no avail as against a company if the contract is one by which the company would not have been bound even if all proper formalities had been observed; nor will ratification by the shareholders amount to a ratification by the company if the contract is *ultra vires* of the company. If, on the other hand, the contract would have been binding on the company if all proper formalities had been observed, or if all the shareholders had concurred in it, ratification by or on behalf of the company is perfectly possible (*x*). Where the contract is one which it is competent for the directors to make, it is also one which it is competent for them to ratify; and in such a case knowledge by them is for the purpose in question equivalent to knowledge by the company (*y*). Where, however, the contract is one which it is not competent for the directors to make, ratification on the part of the shareholders must be proved in order to establish

(*q*) *Supra.*
(*r*) *Per* Curiam.
(*s*) Freeman *v.* Rosher, 13 Q. B. 780; Eastern Counties Rail. Co. *v.* Broom, 6 Ex. 314; see Com. Dig. "Trespass," C. 1; and Gauntlett *v.* King, 3 C. B., N. S. 59.
(*t*) Roe *v.* Birkenhead, &c. Rail. Co., 7 Ex. 36.
(*u*) 13 Q. B. at p. 789.
(*v*) See Gauntlett *v.* King, 3 C. B. N. S. 59.
(*x*) Lindley on Partnership, i. 273 (3rd ed.)
(*y*) *Ibid.* 274; Smith *v.* Hull Glass Co., 11 C. B. 897; Wilson *v.* West Hartlepool Rail. Co., 2 De G., J. & Sm. 475.

★ ratification by the company (*z*); but such ratification [★ 74] will be inferred from slight circumstances (*a*).

Informal ratification of informal contract.]—Where particular formalities are required to be observed by law in order that a contract may be binding, an informal ratification of an informal contract is of no avail except in the limited class of cases to which the equitable doctrines of part performance are applicable (*b*).

Summary]—We may now sum up what has been said with regard to the essentials of ratification. In order, then, that a ratification may be binding, the following requisites must be satisfied:—

(1.) The act to be ratified must be voidable and not void;
(2.) It must be performed by one professing to act for another;
(3.) The person in whose behalf the act is done must be in existence at the time of its performance: except in cases governed by rules of equity;
(4.) The person who undertakes to ratify must do so with a knowledge of all material circumstances, or with an intent to take all liability without such knowledge;
(5.) He must also be capable of ratifying the act;
(6.) When formalities are necessary they must be observed.

In considering the question of ratification, it may become very important to consider what circumstances will be held to be material. The question does not appear to have ever been fully discussed in any reported case. It was raised in *Hilbery* v. *Hatton* (*c*), but not considered at any length, inasmuch as there was clear proof that the defendant ratified an act of his agent, which on authority (*d*) constituted a conversion. The counsel for the defendants argued that there could be no ratification unless the principal knew the circumstances of the case. To this Baron Martin replied, that if the defendants knew all the circumstances which made the act of dealing with another man's chattel a conversion, the only adoption necessary was a ratification of that which was the wrongful act. This reply does not fully meet the contention, for the defendants did not know all ★ the circumstances of the agent's con- [★ 75] duct. What they did amounted, strictly speaking, to a ratification without inquiry.

SECT. 2.—*Ratification, Express and Implied.*

As to the evidence that will establish a ratification—It must not rest upon mere probability or conjecture.]—A ratification may be express or it may be implied. When one individual deliberately,

(*z*) Athenæum Life Assurance Society *v.* Pooley, 3 De. G. & J. 294; and see *supra*, p. 62.
(*a*) Lane's case, 1 De. G., J. & Sm. 504. See *infra*, p. 76.
(*b*) See Lindley on Partnership, 277, and cases there quoted.
(*c*) 2 H. & C. 822; 10 L. T. 39.
(*d*) Burroughs *v.* Bayne, 2 L. T. Rep., N. S. 16; 5 H. & N. 296.

whether with full knowledge or without inquiry, ratifies the act or conduct of another, no question arises respecting the fact of ratification.[1] When, on the other hand, there is no express ratification, it becomes important to consider what circumstances have been held sufficient in our courts of law to warrant the inference that a ratification may be implied from them.[2] With respect to the general nature of the evidence that will be thought sufficient to establish a ratification, the remarks of the learned judges in *Fitzgerald* v. *Dressler* (*e*) may be studied with advantage. To establish a case of authority by ratification there must be some substantive proof; it must not rest upon probability or conjecture (*f*); certainly it would be very unsafe to say that because there is a strong probability of the existence of a state of things from which a prior authority or a subsequent ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof (*g*). In the same case, Willes, J. (*h*), points out that it is not competent to a jury, when dealing with the acts of a third party, to act upon probabilities: "there being no original authority in H.," said the same

(*e*) 7 C. B. N. S. 374.
(*f*) Per Crowder, J., 7 C. B. N. S. 397.
(*g*) See per Williams, J., *ibid.* 396.
(*h*) *Ibid.* 398; and see *infra*, pp. 79—81.

[1] The authority of an agent to execute a written contract for the purchase of land may be shown by an oral ratification: and the acts of the principal, from which such ratification may be inferred, are competent evidence for that purpose. Hammond *v.* Hannin, 21 Mich. 374; Meyer *v.* Morgan, 51 Miss. 121; S. C. 24 Amer. Rep. 617.

An agent cannot bind his principal as surety for another, unless authorized so to do in writing, and a ratification of such an act will not be good unless in writing. Ragan *v.* Chenault, 78 Ky. 545.

Nor can the act of an agent in executing a bond or other sealed instrument be ratified except by a writing under seal. Ingraham *v.* Edwards, 64 Illi. 526; Pollard *v.* Gibbs, 55 Ga. 45; but see Holbrook *v.* Chamberlain, 116 Mass. 155.

[2] Harrod *v.* McDaniels, 126 Mass. 413; Connett *v.* Chicago, 114 Illi. 233; Wallace *v.* Lawyer, 90 Ind. 499.

A ratification is implied, whenever the acts and conduct of the principal, he having full knowledge of the facts, is inconsistent with any other supposition, than that of a previous authority, or an intention to abide by the agent's act, though it was unauthorized, or defectively executed. Taylor *v.* The A. & M. Association, 68 Ala. 230.

To constitute the conversations and acts of the principal, with knowledge of the facts, a ratification, it is not material whether a ratification was contemplated or not. Hazard *v.* Spears, 2 Abb. App. Dec. 353. When a party claims, receives and retains what was obtained by an unauthorized use of his name, it amounts to a ratification of the act. Smith *v.* Tracey, 36 N. Y. 79.

The following are cases in which the principal has received the benefit of the unauthorized act and where such has been held a ratification of it. Arnold *v.* Spurr, 130 Mass. 347; Ely *v.* James, 123 Mass. 36; Wright *v.* Burbank, 64 Pa. St. 247; Taylor *v.* The A. & M. Asso., 68 Ala. 229; Herring *v.* Skeggs, 73 Ala. 446; Nichols *v.* Shaffer, 30 N. W. Rep. 383; Baidman *v.* Goodell, 56 Iowa, 592; Frank *v.* Jenkins, 22 Ohio, St. 597; Harris *v.* Simmerman, 81 Illi. 413; Scott *v.* R. R., 86 N. Y. 200; Miles *v.* Ogden, 54 Wis. 573; Davis *v.* Krum, 12 Mo. App. 279. See Merrick Thread Co. *v.* Phila. Shoe Co., 115 Pa. St. 314.

learned judge, "to make the promise, it was a thing done by him out of the ordinary scope of his duty: and though there was a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty, and the rule '*Omnia præsumuntur ritè esse acta donec probetur in contrarium*' is never applied to such a duty as that."

The rule requiring substantial proof of a ratification is, with good reason, applied to cases of trespass. By the common law, ★ if [★ 76] a principal agree to a trespass after it is done, he is no trespasser "unless the trespass was done to his use or for his benefit" (*i*). Besides, it should not be forgotten, in actions for false imprisonment, that courts of law will take care that people are not put in peril for making complaint when a crime has been committed (*k*). A plaintiff having been apprehended at the instance of the defendant's son, on a charge of obtaining money by false pretences, of which charge, after a remand, he was acquitted, brought an action for trespass and false imprisonment against the father. There was no proof that the son was authorized to make the charge; but there was evidence that after the remand the defendant, when told by his son that he had caused the plaintiff to be apprehended, said he would have nothing to do with it. The court held that there was no evidence of a ratification (*l*). "No man," said Willes, J., "ought, as a general rule, to be responsible for acts not his own."

Slight evidence sufficient.] — It is generally laid down in text books that a small matter will be evidence of such assent as will support a plea of ratification (*m*). The cases cited in support of the statement contain nothing inconsistent with the above-quoted decisions, for in all of them there was evidence which did not rest merely upon probability or conjecture (*n*).

After ratification there is no locus pœnitentiæ.]—There are two rules respecting ratification which may be noticed here. The first is, that if a principal ratifies and adopts the agent's acts, even for a moment, he is bound by them (*o*).[1] In other words, after ratification there is no *locus pœnitentiæ*. The second rule is, that there can be no ratification of a part only of a transaction.[2] In other

(*i*) Co. Inst., iv. 317.

(*k*) *Per* Pollock, C. B., in Grinham *v.* Willey, 4 H. & N. 496; and see the observations of Lord Cranworth and Alderson, B., in Gosden *v.* Elphick, 4 Ex. 445, 447.

(*l*) Moon *v.* Towers, 8 C. B., N. S. 611.

(*m*) Paley on Agency, 171; Chitty, Com. Law, iii. 199; Story on Agency, 252.

(*n*) See Ward *v.* Evans, 6 Mod. 37; Thorald *v.* Smith, 11 Mod. 88; 2 Ld. Rym. 93.

(*o*) Smith *v.* Codogan, 2 T. R. 189.

[1] Beall *v.* January, 62 Mo. 434; Vaughan *v.* Sheridan, 50 Mich. 155; Andrews, *v.* Insurance Co., 92 N. Y. 596.

[2] Barhydt *v.* Clark, 12 Illi. Ap. 646; Cochran *v.* Chitwood, 59 Illi. 53; Roberts *v.* Rumley, 58 Iowa, 301; Express Co. *v.* Palmer, 48 Ga. 85; Fowler *v.* N. Y. Ex. 67 N. Y. 138; Strasser *v.* Conklin, 54 Wis. 102.

words, the law does not allow one part of a transaction to be affirmed and the rest to be disallowed. One cannot "blow hot and cold.' Hence, to treat a party as one's agent in respect of one part of a transaction, is equivalent to a ratification of the whole transaction (*p*). For instance, if a principal ratify a contract made by [★ 77] his agent, he incurs the same liabilities as if ★ he had originally authorized it (*q*). An adoption of a contract, then, is an adoption *in omnibus;* hence, if the contract embodies an agreement that the defendant should set off a debt due to him from the agent, the principal must take the contract subject to this agreement (*r*).

Ratification by infant.]—In order to amount to a ratification after attaining full age, within 9 Geo. 4, c. 14, s. 5, "there must be a recognition by the debtor after he has attained his majority of the debt as a debt binding upon him" (*s*). A recognition when of full age, and a promise to pay it "as a debt of honour" when of ability, is not such a ratification (*t*). By ratification is meant an admission that the party is liable and bound to pay the debt (*u*).

A set-off cannot be maintained of a debt contracted by the plaintiff during infancy, and not ratified by him in writing after full age (*x*).

A contract of marine insurance may be ratified after loss known.]—When a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified, after the loss of the thing insured, by the party on whose behalf it is made, though he knew of the loss at the time of the ratification (*y*).[1] The justice as well as the authority of this principle was insisted upon by the Court of Appeal in a case decided in 1876, where Cockburn, C. J., pointed out that, where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility of the contract (*z*).

Illustration of the above principle.]—The following cases are

(*p*) Wilson *v.* Poulter, 2 T. R. 2 Str. 859; Hovil *v.* Pack, 7 East, 164; Small *v.* Attwood, 6 Cl. & F. 232.

(*q*) Wilson *v.* Tumman, 6 M. & Gr. 236; Smethurst *v.* Taylor, 12 M. & W. 554; Doe *v.* Goldwin, 2 Q. B. 143.

(*r*) Ramozetti *v.* Bowring, 7 C. B., N. S. 851, *per* Erle, C. J.

(*s*) Rowe *v.* Hopwood, L. R., 4 Q. B. 1, per Cockburn, C. J.

(*t*) Maccord *v.* Osborne, 1 C. P. Div. 568.

(*u*) Per Parke, B., Mawson *v.* Blane, 23 L. J., Ex. 342; 10 Ex. 206—210.

(*x*) Rawley *v.* Rawley, 1 Q. B. Div. 460.

(*y*) Williams *v.* North China Insurance Co., 1 C. P. Div. 757.

(*z*) *Ibid.*

[1] Where a policy of insurance is for account of whom it may concern even though it does not appear that the person who obtained the insurance did so by authority from the owner of the goods, the jury may presume a ratification of it by the owner, if it be for his benefit. Flemming *v.* Marine Insurance Co., 4 Whar. (Pa.) 59; Lazarus *v.* Comm. Insurance Co., 2 American Leading Cases, 801, 844.

selected as illustrative of the nature of the evidence necessary to prove a ratification :

In *Granby* v. *Allen* (*a*), trover was brought to recover money paid by the plaintiff's wife for land conveyed to her by the defendant, and it was held by Holt, C. J., that the husband ★ could re- [★78] cover money so laid out, unless he was either privy to the purchase or consented to it afterwards.

In *Howard* v. *Baillie* (*b*), it was held that if the agent of an executor accept a bill, and the executor admit that the bill accepted with his knowledge is for a just debt and ought to be paid, there is sufficient evidence of a ratification of the agent's act in accepting the bill.

In *Haseler* v. *Lemoyne* (*c*), A. was the general agent to manage B.'s property. He signed a warrant to distrain the goods of C., a tenant, for arrears of rent. After the goods had been distrained, B. said he should leave the matter in A.'s hands, and it was held that this amounted to a ratification of A.'s acts.

Benham v. *Batty* (*d*) was an action to recover a deposit. The defendant employed an agent to sell the lease of a certain house. The latter exceeded his authority, and took a deposit for the conveyance of a longer term than he was authorized to dispose of. The defendant refusing to complete this agreement, the plaintiff applied to the agent for a return of his deposit. Before he would do so he required an order from the defendant, and it was held that this order was evidence of a ratification of a previous general authority, so as to make the defendant liable for the deposit.

Fitzmaurice v. *Bayley* (*e*) is an instance of a ratification without inquiry. An agent exceeded his authority in agreeing for the purchase of certain buildings. A dispute having arisen, the plaintiff wrote respecting the agent's authority, "I left everything to him" (the agent), "desiring him to do the best he could. What he has done for me I know not; but of course I must support him in all he has done for me, except incivility." This was held to be a full ratification of the agent's agreement.

In *Hawley* v. *Sentance* (*f*), an agent for the purchase of goods on credit paid for certain goods out of his own money. This fact was known to the principal, who directed the agent to clear the goods at the Custom House. In the usual course of business this would be done after payment of the price by the agent for the principal. This direction was held to be a ratification of the previous payment by the agent, so as to enable him to sue ★ the [★79] principal for the price as money paid to his use at his request.

(*a*) Ld. Raym. 224.
(*b*) 2 H. Bl. 618.
(*c*) 5 C. B., N. S. 530; 28 L. J., C. P. 103.
(*d*) 13 W. R. 266; 12 L. T. 266.
(*e*) 6 El. & Bl. 868; 26 L. J., Q. B. 114.
(*f*) 7 L. T. 745; 11 W. R. 311.

Ratification by one joint owner.]—An unauthorized order to sell given by one joint owner is ratified by the other joint owners joining in a power of attorney enabling their agents to convey their respective shares (*g*).

Previous to the passing of the Judicature Acts, a ratification might also be implied from the form of action adopted for the enforcing of one's rights (*h*).

Ratification may be inferred from silence.]—In conclusion, it may be laid down as a rule that a ratification may be inferred from acquiescence.[1] But this acquiescence may itself be either express or it may be implied. It may be implied from an act, as in some of the above instances, or, in short, from any circumstances which clearly indicate an intention to adopt the unauthorized act or conduct of the agent. In all cases when the acquiescence has been implied from an act, it will be found that the principal has done something which assumes the authorization and validity of the act

(*g*) Keay *v.* Fenwick, 1 C. P. Div. 745.

(*h*) See Smith *v.* Hodson, 4 T. R. 211; Ferguson *v.* Carrington, 9 B. & C. 59; and Mould *v.* Andrews, 35 L. T. 813.

[1] P. W. & B. R. R. *v.* Cowell, 4 Casey, 329; Bank of Pennsylvania *v.* Reed, 1 W. & S. 101; Kelsey *v.* National Bank, 69 Pa. St. 426. In this last case a cashier of a bank with a minority of the directors offered a reward for the detection of a thief. The question was whether the acquiescence of the directors amounted to a ratification. Williams, J., in his opinion, said, "The law is well settled, that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own. Bredin *v.* Dubarry, 14 S. & R. 30; and the maxim which makes ratification equivalent to precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent. Gordon *v.* Preston, 1 Watts, 387.

It was accordingly held in the Bank of Pennsylvania *v.* Reed, 1 W. & S. 101, that though the authority of the cashier does not extend so far as to justify him in altering the nature of the debt due the bank, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor, yet a subsequent acquiescence of the bank in such an exercise of power would be conclusive upon it. In delivering the opinion of the court, Rodgers, J., said, "It is a very clear and salutary rule in relation to agencies, that when the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them, under the pretence that they were done without authority, or even contrary to instructions. *Omnis ratihabitia mandato aequiparatur.*"

When the principal has been informed of what has been done, he must dissent and give notice in a reasonable time, and if he does not, his assent and ratification will be presumed. If then the directors of the bank were informed that the cashier had offered the reward, it was their duty promptly to disavow the act, if they did not intend that the bank should be bound by it. If they had notice of the offer and did not dissent from it, their assent and ratification must be presumed. Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors, when sitting in their official character as a board. If they were personally cognisant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it." On same subject see Maddux *v.* Bevan, 39 Md. 485; Owsley *v.* Woolhopter, 14 Ga. 124.

that awaited ratification ; such, for instance, as bringing an action which postulates as a condition for its maintenance the recognition of a previously-unauthorized act of the agent. (See the cases cited note (*h*).)

Importance of the consideration whether the act was done by a volunteer.]—In considering whether any given facts are sufficient evidence of a ratification, it is important to consider whether the relation of principal and agent already exists, or whether the person who has done the act awaiting ratification is a mere volunteer. The distinction inferred by Livermore (*i*) from this difference is that in the former case, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him of what has been done on his account, whereas in the latter case there exists no obligation to answer such a letter, nor will silence be construed into a ratification. Judge Duer has suggested the same distinction (*k*). It is adopted by Arnould (*l*), with the ★ limitation, however, that the latter part of the [★ 80] inference is not universally true, and by Story (*m*). Whether silence operates as a presumptive proof of a ratification may, as the latter learned author remarks, depend upon the particular relations between the parties, and the habits of business and the usages of trade. *French* v. *Backhouse* (*n*), decided in 1771, was one of the earliest cases in which the subject was mooted. The plaintiff, a ship's husband, appointed by a deed executed by all the joint owners of the ship, was empowered generally to act in that capacity. He insured the ship, and to recover the money so paid sued two of the joint owners for the whole amount paid. The court ruled that the plaintiff could not insure for a part-owner without his particular direction, nor for the owners jointly without their general direction. There was no proof of an express direction, but it was argued by the plaintiff's counsel that having been informed of the insurance, and having made no objection, they must be taken to have ratified the agent's act. A verdict was given for the plaintiff. The court discharged a rule for a new trial. "The evidence," said Lord Mansfield, "brought to prove that there was a general direction given by all the owners was not that they gave an express direction; it only proved that they were told of the insurance, and expressed no objection to it."

In *Prince* v. *Clark* (*o*), decided in the Court of King's Bench in 1823, the only point before the court related to this question of ratification. The plaintiff consigned certain goods for sale to the

(*i*) Law of Principal and Agent, i. 50.
(*k*) Duer, vol. ii., 151—154, and 178—182, n. 5.
(*l*) Marine Insurance, i. 151.
(*m*) Agency, pp. 255, 258.
(*n*) 5 Burr. 2727.
(*o*) 1 B. & C. 186.

defendant, the captain of a ship bound for Calcutta, with directions for the disposal of the proceeds of the sale. The defendant exceeded his instructions by investing the proceeds in buying sugars. He informed the plaintiff by letter of the purchase. The letter was received by the plaintiff on the 29th May. After receipt of the letter the plaintiff, on August 7th, told C., who had from time to time acted as B.'s insurance agent, that he would not accept the sugars, and advised C. to insure them. C. declined to interfere. The plaintiff then sued the defendant for the value of the sugars. At the trial, Chief Justice Abbott directed the jury that the plaintiff was bound to notify his dissent within a reasonable time if he [★ 81] had any means of ★ doing so, and his lordship left it to them to say (1) whether the plaintiff, knowing as he did the relationship which existed between C. and the defendants, ought not to have notified his rejection of the sugars to him, and (2), if so, whether the dissent was notified in time. A verdict was found for the defendants. A new trial was refused by the whole court.

Abbott, C. J., said, "The plaintiff certainly was not bound to accept the sugars. It was his duty, however, to notify his rejection of them within a reasonable time after he received intelligence of the purchase, if there was any person here to whom that notice could be given." "The plaintiff," remarked Bayley, J., "has no right to pause and to wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial or prejudicial: he is bound, if he dissents, to notify his determination within a reasonable time, provided he has an opportunity of doing so." Holroyd and Best, JJ., concurred.

The principle stated in *French* v. *Backhouse* (*p*) was acted upon in the more recent case of *Robinson* v. *Gleadow* (*q*), decided by the Court of Common Pleas in, 1835. Here acquiescence in an unauthorized insurance was inferred from the fact that the principals made no objection when they were fully aware of what was done in their behalf. The main question was whether the managing owner of a ship had authority to insure for the joint owners. There was no evidence of an express authority, but it was sufficiently proved that the other part-owners were continually visiting H.'s counting-house; that they often saw and inspected his accounts; that the books themselves were open for their inspection; that the insurance was made for their joint account and benefit, and that they never made any objection. It was held, therefore, that the case came within the doctrine of Lord Mansfield in the above case. "They were fully informed of what was done, and acquiesced, never having made any objection" (*r*).

(*p*) *Supra.*
(*q*) 2 Bing. N. C. 156.
(*r*) Per Park, J.

★ SECT. 3.—*Consequence of a Ratification.* [★82]

As between principal and agent.]—The maxim of the common law, as we have seen, is that a ratification has the effect of a previous command. In order, however, to see as clearly as possible the consequences which flow from a ratification, it will be well to consider separately the parties whose rights may be respectively affected. The relative rights then which may be affected by a ratification are those of

(1.) The principal and the agent;
(2.) The principal and third parties;
(3.) The agent and third parties.

In the first place, the consequences of a ratification, as it affects the relative rights of the principal and agent, will be considered. The general rule is, that if an act is done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, it becomes the act of the principal if subsequently ratified by him.[1] In such a case the principal is bound by the act, whether it be to his detriment or for his advantage, and whether it is founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority (*s*). Hence, if an agent incur expenses by departing from his instructions, and the principal afterwards ratify such departure, the agent is entitled to recover the expenses so incurred (*t*). In *Hovil* v. *Pack* (*u*), the same rule was stated more briefly. If you adopt A. as your agent on your own behalf, you must adopt him throughout and take his agency *cum onere* (*x*). The act done must be for the benefit of the principal (*y*). A ratification must extend to the whole of a transaction.[2] So well established is this principle, that if a party is treated as an agent in respect of one part of a transaction, the whole is thereby ratified (*z*). From this maxim results a rule of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it ★ has been made cannot take the benefit of it without bearing [★83] its burdens. The contract must be performed in its integrity (*a*).

(*s*) Wilson *v.* Tumman, 6 M. & Gr. 236; 6 Scott, N. R. 894; 1 D. & L. 513.
(*t*) Frixione *v.* Tagliaferro, 10 Moo. P. C. C. 175.
(*u*) 7 East, 164.
(*x*) See, to the same effect, Ramazotti *v.* Bowring, 7 C. B., N. S. 851, per Erle, C. J.; Attwood *v.* Small, 6 Cl. & F. 232.
(*y*) Wilson *v.* Barker, 4 B. & Ad. 614; Goodtitle *v.* Woodward, 3 B. & Ald. 689.
(*z*) Wilson *v.* Poulter, 2 Str. 859; Attwood *v.* Small, 6 Cl. & F. 232.
(*a*) Bristowe *v.* Whitmore, 9 H. of L. Cas. 391; 31 L. J., Ca. 467.

[1] U. S. Express Co. *v.* Ramson, 106 Ind. 215; Hankins *v.* Barker, 46 N. Y. 666; Roby *v.* Cossitt, 78 Illi. 638; Drakely *v.* Gregg, 8 Wall. (U. S.) 242; St. Louis N. S. Y. *v.* O'Reilly, 85 Illi. 546; Hall *v.* R. R., 48 Wis. 317; Summerville *v.* R. R., 62 Mo. 391; Gulick *v.* Grover, 33 N. J. L. 463.
[2] Laird *v.* Campbell, 100 Pa. St. 159.

A principle cannot take the benefits and disclaim the burden.]—In *Bristowe* v. *Whitmore* (*b*), decided by the House of Lords in 1861, the master of a ship entered into a charter-party whereby he was himself to receive the freight. As a consideration for this he was to convey troops, and to fit the vessel for that purpose. He advanced money out of his own pocket, and drew bills on the owner for the rest of the expenses, to enable the ship to earn the freight. The contract was ratified by the owner. The House of Lords held that the owner could not take the benefit of the contract, and leave the onerous parts: that the master, if sued by the owner for the freight as money had and received, would have had a right at law to deduct the money so advanced without pleading a set-off, and that he had a right in equity to be reimbursed out of the freight so earned, such a case not falling within the rule that the master has not, in ordinary circumstances, a lien on the freight for wages and disbursements. Lords Wensleydale and Chelmsford dissented from the opinion of the majority of the noble lords, on the ground that there was no question of ratification, and that the master should therefore look to the owner only for reimbursement in the usual way. They did not dissent from the principle above stated. The maxim "*Qui sentit commodum sentire debet et onus*" requires little to be urged in its support, founded as it is upon just and equitable grounds. Where a ratification is proved the principle applies, but it is not always easy to decide whether the facts in a particular case support the inference of a previous but implied authority, or whether not going to that length may prove a ratification. Of course, in the former case, the principle has no application.

As between the principal and third parties, the former takes the place of the agent.]—We now come to the second question, namely, the effect of a ratification upon the relative rights of the principal and third parties. As soon as there is a ratification the principal steps into the place of the agent. He becomes immediately invested with all the rights and all the duties that flow from the transaction or conduct by him ratified.[1] The person whose conduct is ratified [★ 84] sinks into a subordinate position, ★ and exchanges his original rights and duties, so far as these were due to the particular transaction, for the rights and duties of a duly authorized agent. Hence, where an unauthorized person entered into and signed as agent of the owner an agreement for the sale of an estate, and the owner afterwards signed it, expressing at the same time on the face of the instrument his sanction and approval of the agent's conduct, the agent could not be rendered personally liable upon the contract, the purchaser's remedy being against the principle (*c*). So if a

(*b*) *Supra.*

(*c*) Spittle *v.* Lavender, 2 Brod. & Bing. 452; and see Kendray *v.* Hodgson, 5 Esp. 228.

[1] Hankins *v.* Baker, 46 N. Y. 666; Drakeley *v.* Gregg, 8 Wall. (U. S.) 242; Gulick *v.* Grover, 33 N. J. 463.

contract in writing is made for a principal without authority, and the principal subsequently ratifies the contract, the ratification renders the agent authorized to enter into the contract under the Statute of Frauds (*d*). But the signature of an agent will not satisfy sect. 6 of Lord Tenterden's Act (*e*), though the agent's act was ratified (*f*).

Effect of the Statute of Frauds—Departure from terms of written contract.]—One of the more recent cases upon the question of the operation of the Statute of Frauds in cases of ratification came before the Court of Queen's Bench in 1875 (*g*). A verbal contract for the delivery of three cases of leather cloth to the defendant at Cologne was entered into in February, 1870, between the defendant's son, A., and the plaintiffs. The goods were to be sent from London, by Ostend. When the goods were ready, the plaintiffs had given up their Ostend route and returned to the Rotterdam route. They shipped the goods in March, and sent an invoice to the defendant, together with a notification of the change in the route. The defendant did not answer this letter, but ordered more goods, which were forwarded in the same way. In the voyage the three cases were much damaged. The defendant, in a letter dated 5th July, refused to pay for them, on the ground that the instructions were to send them *viâ* Ostend. Two questions on the above facts were raised at the trial; first whether there was sufficient memorandum in writing signed by the defendant; secondly, whether he had by his silence and subsequent conduct assented to the ★ changed route before the loss. Both questions were an- [★85] swered in the affirmative. The full court upheld the ruling of the learned judge at the trial. "It is impossible to say," said Lord Chief Justice Cockburn, "that there was not in this case a written memorandum of the original contract, and that the departure from the terms of that contract in the mode of delivery cannot be ratified by the other party without writing. If he receives the goods, or if he has ratified the mode by which they were sent, he cannot be heard to say that it was a new contract and cannot be enforced because it was not in writing. There was sufficient evidence in the present case for the jury that the defendant had ratified the route by which the plaintiffs had forwarded the goods." Mr. Justice Blackburn spoke to the same effect: "The first part of the letter of the 5th July in the most distinct terms refers to the plaintiffs' letter of the 1st March, and clearly admits that all that was said in it was quite true. . . . This letter was signed by the defendant or his agent, and therefore the statute has been satisfied, and there is a memorandum in writing by the defendant, the party to be charged,

(*d*) See Wilson *v.* Tumman, 6 M. & Gr. 236; Bird *v.* Brown, 4 Ex. 786; 19 L. J., Ex. 786; Maclean *v.* Dunn, 4 Bing. 722; Hilbery *v.* Hatton, 2 H. & C. 822; 33 L. J., Ex. 190; Soames *v.* Spencer, 1 Dow. & Ry. 32.

(*e*) 9 Geo. 4, c. 14.

(*f*) Williams *v.* Mason, 21 W. R. 386; 28 L. T. 232.

(*g*) The Leather Cloth Co. *v.* Hieronimus, 10 L. R., Q. B. 140.

or his agent. But it was argued that, though there was that letter of the defendant to the plaintiffs, there was no assent in writing to the substituted contract." But, as his lordship pointed out, the plaintiffs did not rely on a substituted contract, but on the original contract. The same learned judge could not "see why the assent to a substituted mode of performing one of the terms of a contract need be in writing, thought the contract must have been in writing, there being totally different things involved,—the proof of a substituted contract, the proof of a ratification or approval after performance of the substituted mode of performance." A careful examination of this case will show no undue relaxation of the principle requiring substantial proof a ratification (*h*). In the first place, the substituted mode of delivery was the usual one when the port was open; secondly, the defendant made no objection before the loss, nor for four months after receiving notice of the change; thirdly, during this period, the defendant sent several orders, and the goods were sent by the route on which the loss occurred.

Ratification by corporation of act of their town clerk.]—In *Cheetham* v. *Mayor, &c. of Manchester* (*i*), an attempt was made ★ to maintain the existence of a qualified kind of ratification. A town clerk, acting on behalf of the corporation, directed the surveyor, who had certified, as required by 3 Vict. c. 36, s. 38, that there was imminent danger from a building of which the plaintiff was the owner and occupier, to cause the buildings mentioned in his certificate to be taken down or repaired in such manner as he should think fit. By sect. 39 of the above act, the expenses so incurred may be recovered from the owner. Assuming that the acts of the officers were ratified, it was contended by the solicitor-general that a ratification might suffice to protect the agent from liability, and yet not make his acts the acts of the corporation; that the ratification might be valid as against the defendants, and have no further effect. The argument fell to the ground. No case was cited in its support, nor, upon principle, can anything be urged in its favour. If a ratification means anything it means that the party ratifying has, by his act, become invested with the rights and duties of a principal in relation to third parties, and to the individual whose conduct is ratified. Wherever a ratification is proved, there can be no doubt that this is the general effect.

[★86]

As between the agent and third parties—A distinction made between torts and contracts—The Crown and others.]—As regards the consequences of a ratification in the case of the agent and third parties, the rule is, that wherever an agent acts without authority he is personally liable (*k*). As between the principal and agent, the want of authority is entirely remedied by a subsequent ratifica-

(*h*) *Vide supra.*
(*i*) L. R., 10 C. P. 249.
(*k*) East India Co. *v.* Hensley, 1 Esp. 112; Polhill *v.* Walter, 3 B. & A. 114; Bowen *v.* Morris, 2 Taunt. 374.

tion (*l*). But in considering how a ratification affects the relative rights of the agent whose conduct is ratified and third parties, a distinction must be made between contracts and torts.[1] When the contract of an agent is duly ratified, credit having been given to the principal, his rights and liabilities arising from that contract are wholly transferred to the party ratifying, and the agent occupies a position identical with that of one invested with full authority to do the act ratified. He can neither sue in his own right nor be rendered personally liable (see cases cited above). When, on the other hand, an individual duly ratifies a tort committed by another on his behalf, the ratification has not the same wide effect. For whilst on the one hand it avails to shield the agent from any ★ lia- [★87] bility to the principal from the conduct so ratified, it does not take away his liability to third parties who have suffered a tort at his hands. This distinction applies universally, except in cases of ratification by the crown (*m*).

In *Stephens* v. *Elwall* (*n*), decided in 1815, Lord Ellenborough applied the principle in an action of trover brought against an agent. Wherever an agent is so sued, it is no answer that he acted under authority from another who had himself no authority to dispose of the property. So where a servant or other agent has done some act amounting to a trespass in assertion of his master's right, he is liable, not only jointly with his master, but for every penny of the damage, nor can he recover contribution (*o*). It is well established that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal (*p*). The crown may ratify the torts of its agents, and such a ratification has a novel effect upon the relative rights of the agents and third parties. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged; it is still a mere trespass, and the party injured has his option to sue either: if the crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the option of bringing his action against the agent who committed the trespass, or the principal who ratified it, but a remedy against the crown only, if there is any remedy at all, and exempts from all liability the person who commits the trespass (*q*).[2]

(*l*) *Supra*.
(*m*) Buron *v.* Denman, 2 Ex. 167.
(*n*) 4 M. & S. 256.
(*o*) *Ibid.* 261.
(*p*) Perkins *v.* Smith, 1 Wil. 328; Cranch *v.* White, 1 Bing. N. C. 414; Davies *v.* Vernon, 6 Q. B. 443; and Hilbery *v.* Hatton, 10 L. T. Rep., N. S. 39, per Martin, B.
(*q*) Per Parke, B., in Buron *v.* Denman, 2 Ex. 167.

[1] Story on Agency, §§ 244–7.
[2] Buron *v.* Denman, 2 Ex. 167; People *v.* McLeod, 25 Wend. N. Y 482. An act of Congress approved March 2, 1867, provided "That all acts, proclamations and orders of the President of the United States, or acts done by his authority or approval after the fourth day of March, Anno Domini eighteen hundred and sixty-one, and before the first day of July, Anno Domini eighteen hundred and

sixty-six, respecting martial law, military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aidors or abettors thereof, or of any violation of the laws or usages of the war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts-martial, or military commissions, or arrests or imprisonment made in the premises by any person by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous and express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted and expressly authorized and directing the same to be done. And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts, for any act done or admitted to be done in pursuance or in aid of any said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises shall be held *prima facie* to have been authorized by the President." 14 U. S. Statutes at Large, 432.

"The doctrine that a ratification is equivalent to command has never been carried further than in this instance. If the statute is constitutional, Congress is as all powerful as Parliament, and may put the military power above the civil not only where war actually exists, and at places occupied by the hostile or contending forces, but throughout the country, and in districts where the courts are open and the ordinary course of life undisturbed." Hare on Contracts, page 290, note.

★CHAPTER VIII. [★88]

OF THE DETERMINATION OF THE CONTRACT.

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Modes in which the authority may be determined.]—The authority of an agent may be determined in one of three ways. It may be dissolved either (1) by agreement, or (2) by act of party, or (3) by operation of law. These are the general heads to which may be referred all modes of putting an end to the authority of an agent. Under these general heads, however, are contained others, which may be easily gathered from the following table:—

(a.) By agreement:
1. By performance of the object of the agency;
2. By efflux of time.

★(b.) By act of party: [★89]
1. By revocation of authority;
2. By renunciation of the agency.

(c.) By operation of law:
1. By death of principal;
2. By death of agent;
3. Bankruptcy of principal;
4. Bankruptcy of agent;
5. Marriage of *feme sole* (principal);
6. Insanity of agent;
7. Insanity of principal;
8. Destruction of the subject-matter of the agency.

SECT. 1.—*By Agreement.*

Cases where the authority is limited in time or otherwise.] — Wherever an express agreement exists, limiting the agency either to some definite object or for some definite time, as, for instance, where a man is authorized to buy a quantity of merchandise according to sample, or to buy generally for a year, there being at the same time a condition that the employment shall continue in the one case until the merchandise has been bought, and in the other until the year has expired, the agency will be dissolved in due course by the happening of these results respectively:[1] and, under

[1] Or where the owner of land employed an agent to sell the same, the agreement being that if the latter would obtain a purchaser the former would give him a certain sum for his services. *Held*, that as soon as the purchaser was obtained the agency was at an end. Short *v.* Willard, 68 Illi. 292. The agency of a real estate agent and his duties to his principal is determined by the delivery of the title papers and payment for the property. Walker *v.* Derby, 5 Bissell (U. S.), 134.

After such termination of the agency, the agent has the same right to deal *with the property* as any other person, *id.* If the principal attacks any subsequent transaction of the agent, he must show that such interest was acquired during the continuance of the agency, *id.*

Where an agent employed to secure a debt due his principal, takes notes endorsed by the debtor to the principal, the agency does not cease till his acts have been approved by the principal and the notes delivered up. Until that time the declarations of the agent are admissible against the principle. Wallace *v.* Goold, 91 Ill. 15.

Where one is employed as agent to negotiate for the purchase of a certain tract of land, as soon as he has agreed upon the terms of the sale, and the contract for a conveyance has been delivered to the principal, the agency is at an end. Moore *v.* Stone, 40 Iowa, 259.

Where the treasurer of a town has been authorized to borrow money for the payment of a certain tax, and the tax is paid without the necessity of borrowing money, his authority to borrow thereupon ceases. Benoit *v.* Inhabitants of Conway, 10 Allen (Mass.) 528.

A. & B. entered into a contract of agency. The only provision in reference to the duration of the contract was as follows: "Said B. in consideration of the faithful performance, by the said A. of the obligations by him hereinafter assumed, agrees to furnish the said A. such number of machines as the said A. may be able to sell, as his agent, prior to 1st of October, 1867," held that on 1st of October, 1867, the agency came to an end, and that the sureties on A.'s bond for the faithful performance of his duties as agent were discharged and not liable for any misconduct on his part subsequent to that time. Gundlach *v.* Fischer, 59 Ill. 172.

ordinary circumstances, no question with respect to a dissolution by act of party in the meantime can arise. It is, however, rare that contracts of agency provide for all contingencies. In the cases to which reference will be made upon this head the difficulty has arisen upon the construction of the agreement.

Unilateral contracts — Agreement to serve or perform, but no agreement to employ.]—In *Burton* v. *The Great Northern Railway Company* (*a*), 1854, the plaintiff had agreed on the 1st October, 1851, to convey between certain places named all merchandise that might be presented to him for that purpose, for the sum of 5*s.* per ton. The agreement was to continue in force for the period of twelve months. The plaintiff purchased waggons and horses, and commenced carrying under the agreement. He received notice on the 18th March of the same year that the ★ arrangement [★ 90] would cease from the following 1st April. The court (consisting of Parke, Alderson, and Martin, BB.) held that the contract was unilateral. Parke, B., put as a parallel case that of a person who agreed with a wine merchant to purchase of him all the wine which the former might choose to drink during the year, and before six months expired gave notice that he had given up drinking wine. An attempt was made to bring the case within the principle of *Hochester* v. *DeLatour* (*b*). This obviously could not succeed, in the absence of proof of a breach of contract. Here the carrier was an agent to convey such merchandise as was "presented to him." If no merchandise was presented, no part of the contract was violated, for the defendants were under no duty to present merchandise for carriage.

In *Aspden* v. *Austin* (*c*), the plaintiff agreed to make cement of a certain quality for the defendant, who, on condition of the plaintiff's performing his engagement, promised to pay him 4*l.* weekly during the two years following the date of the agreement, and 5*l.* weekly during the next year following, and also receive him into partnership at the expiration of three years. The plaintiff, on his part, engaged to instruct the defendant in the manufacture of cement. Both bound themselves in a penal sum to fulfil the agreement. Subsequently the defendant covenanted by deed for the performance of the agreement on his part. Upon these facts the Court of Queen's Bench held that the provisions in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during two or three years, although the defendant was bound by the express words to pay the plaintiff the stipulated wages during those periods if the plaintiff performed or was ready to perform the condition precedent on his part. In this case the circumstances in favour of the plaintiff are even stronger than in *Burton* v. *Great Northern Railway Co.* (*d*).

Lord Denman, in delivering the judgment of the court, made

(*a*) 9 Ex. 507. (*b*) 2 E. & B. 678. (*c*) 5 Q. B. 671. (*d*) *Supra.*

some observations which are appropriate to all actions of a like kind. "Where words of recital or reference manifested a clear intention that the party should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance; . . . where parties [★ 91] ★ have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves; and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they either purposely or unintentionally have omitted." The reason assigned for refusing to draw the inference that the defendant impliedly contracted to employ the plaintiff for three years, was that the defendant would in that case be obliged to continue his business for three years. Hence the court construed the contract to be a contract only to pay certain sums at the stated periods for three years, on condition of the plaintiff's performing the conditions precedent, and he would be entitled to recover them on being ready and willing to perform those conditions if prevented by the act of the defendant.

The case of *Dunn* v. *Sayles* (*e*), was very similar to that of *Aspden* v. *Austin* (*f*), and decided upon similar principles. The declaration stated that it was agreed by deed that the plaintiff's son should continue with the defendant as an assistant surgeon dentist for the term of five years; and that the defendant, in consideration of the services to be performed, covenanted to pay wages weekly, provided, *inter alia*, he worked nine hours a day in his employment. The breach alleged was that the defendant would not permit the plaintiff's son to continue in his service. The court held that the breach was ill-assigned, since there was no implied covenant on the part of the defendant to retain him in his service during the five years. Both the above decisions have been the subject of much [★ 92] comment. By one learned judge ★ it is said that they were considered by many persons as monstrosities (*g*).

One of the leading cases upon the question is *Elderton* v. *Em-*

(*e*) 5 Q. B. 685; 13 L. J., Q. B. 159; and see Williamson *v.* Taylor, 5 Q. B. 175.

(*f*) *Supra.*

(*g*) Erle, C. J., in M'Intyre *v.* Belcher, 32 L. J., C. P. 254; 8 L. T. Rep., N. S. 461.

mens (*h*), decided by the House of Lords in 1853. The declaration was framed in two counts. The first alleged that in consideration that the plaintiff had agreed to become permanent solicitor of a company and act as such, the company, represented by the defendant, promised to retain and employ him as permanent solicitor. The breach assigned was wrongful dismissal. The second count alleged that it was agreed between the parties that the plaintiff should receive a salary of 100*l.* per annum for his services as solicitor, and averred that "the said agreement being so made in consideration that the plaintiff had, at the request of the company, promised the company to perform and fulfil the same in all things on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney of the company on the terms aforesaid." The breach assigned was that the company did not continue to employ him.

The Court of Common Pleas, consisting of Wilde, C. J., Coltman, Maule, and Cresswell, JJ., held that the first count was not supported by proof of a resolution of the directors that the plaintiff "be appointed permanent solicitor to the institution." The word permanent, it was said, denoted no more than a general employment, as contradistinguished from an occasional or special employment. With respect to the second count, the court was of opinion that the agreement did not necessarily imply a promise by the company to employ the plaintiff; and that the consideration being exhausted by the mutual promises, there was nothing to sustain the latter branch of the company's promise. This count was held bad in arrest of judgment.

The Court of Exchequer Chamber was unanimous in reversing the judgment of the Common Pleas upon the second count. "Now, in construing this argument," said Parke, B., who delivered the judgment of the court, "it is to be borne in mind that the word 'agreed' is the word of both, as was held in the case of *Pordage* v. *Cole* (*i*). . . . What, then, is the effect ★ of an [★ 93] agreement to give a certain salary, for one year at least, to a person who engaged for it to give his services if required? We think that this creates the relation of attorney and client, and amounts to a promise to continue that relation at least for a year." Referring to the meaning of the words "retain and employ," his lordship observed, "'to retain' is to 'keep in pay,' to 'hire.' . . . If the word 'employ' means only 'to engage in his service'—one of the meanings of that term—then there appears to be a promise to that effect." This judgment was affirmed by the House of Lords, apparently on the ground stated by Lord Truro, that if a declaration contains allegations capable of being understood in two senses,

(*h*) 4 C. B. 479, 498; 6 C. B. 160; *S. C.*, 17 L. J., C. P. 307; in error, 13 C. B. 495; 4 H. L. Cas. 624.

(*i*) 1 Saund. 319.

and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action.

It does not appear that any of the judges in the above case questioned the decisions in *Aspdin* v. *Austin* and *Dunn* v. *Sayles* (*k*), nor is there any difficulty in understanding the principle upon which those cases were determined. The observations to which they have given rise are due to contentions supposed erroneously to be made on their authority. "The cases of *Aspdin* v. *Austin* and *Dunn* v. *Sayles*," said Maule, J., "are instances of agreements in which a certain duration of the relation between the parties was contemplated and provided for without binding the parties to continue it for the time contemplated." The essential distinction between those cases and that of *Elderton* v. *Emmens*, if we look away from questions of pleading, is that indicated by Maule, J. Such cases, however, are of little use as authorities.

Agreements to employ as sole agent—Sale of business.]—The rule has now been settled by the House of Lords that; where the parties mutually agree for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.

In *Rhodes* v. *Forwood* (*l*), which was decided in 1876, a colliery [★ 94] owner entered into an agreement with the respondents ★ by which they were to become his sole agents for the sale of coal at Liverpool for a period of seven years. At the end of four years the appellant sold the colliery. An action was then brought by the respondents for breach of agreement. The Court of Exchequer, consisting of Bramwell and Cleasby, BB., decided in favour of the defendant. Upon error to the Exchequer Chamber, this judgment was reversed by Lord Coleridge, Lush, and Archibald, JJ.; Quain, J., *diss.* The House of Lords reversed the latter judgment, and thus affirmed the decision of the Court of Exchequer. Lord Cairns pointed out with great clearness that several risks were left altogether uncovered in the agreement; first the appellant might sell the whole of his coal at ports other than Liverpool, and not send a single ton to Liverpool. This was admitted on the part of the respondents. Secondly, the coal might have been sent to Liverpool, but the appellant might have taken a view with regard to the price to be obtained for it, which would have led him to place limits upon the coal, such as to prevent the agents selling any of it in any particular year, and the agents might have been left in that year without any commission, although having coals in stock; because the principal might have thought it expedient to hold the coal and wait for better prices. In this case it was admitted that the

(*k*) *Supra.*
(*l*) L. R., 1 Ap. Ca. 256.

agents could not complain. Thirdly, if the colliery owner had, by reason of difficulties arising from the workers or otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times or a more easy mode of working, the agreement contained nothing to prevent him doing so. "If that is so," said his lordship, "if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool,—if all that was in the favour of the colliery owner, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner not selling his coal elsewhere piecemeal but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no undertaking at all against any of the other risks?" In the court below, Lush, J., relied upon the fact that the agreement contained nothing which ★ implied [★ 95] that the agency was to cease if the appellant chose to sell the colliery. But, asked Lord Chelmsford, how can an intention not in the contemplation of the parties be implied to have existed? All the noble lords agreed in holding that there was no such implied contract as that relied upon by the respondents.

The above decision illustrates the great difference that exists between such a case and all cases in which the court has held that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract (*m*). In such cases authority is of little assistance. Judicial decision on one contract can rarely help to the understanding of another, but *Rhodes* v. *Forwood* supports the proposition, that where a principal, who wants to have a portion of his business transacted in a certain town, engages an agent, and they enter into a mutual bargain, unless there is some special term in the contract that the principal shall continue to carry on his business, it cannot be implied as a matter of obligation that he shall be bound to carry it on for the benefit of the agent (*n*).

SECT 2.—*By Act of Party.*

Revocation of authority by principal—Exceptions.]—A principal may revoke the authority of his agent, unless—

(*m*) See per Lord Penzance, *ibid.*, p. 274; and per Cockburn, C. J., in Stirling *v.* Maitland, 5 B. & S. 840, p. 852.

(*n*) See *Ex parte* Maclure, L. R., 5 Ch. 737; Churchward *v.* The Queen, L. R., 1 Q. B. 173.

(a) The authority is necessary to effectuate any security (*o*),[1] or unless

(b) The authority is coupled with an interest.

The determination of the question, What is an authority coupled with an interest? has from time to time given rise to much discussion. The expression in itself is a vague one, and can be understood, in its legal sense, only by a reference to authorities. At the first thought it might seem that any interest would suffice to make an authority irrevocable. This, however, is erroneous, and the question resolves itself into this, What is the nature of the interest which suffices to make an authority irrevocable? This is a ques- [★ 96] tion which has given rise to much argument, and ★even now it can scarcely be affirmed that the law is clearly settled, and free from reasonable doubt.

Revocation of naked authority—Expense incurred by agent.]—Where the authority given to the agent is a mere naked authority and not coupled with an interest, the principal may revoke such authority at any time before performance (*p*).[2] So an authority to make an order by consent may be withdrawn at any time before the order is passed and entered (*q*). It is not, however, competent to a principal to revoke the authority of an agent without paying for labour and expense incurred by him in the course of the employment, unless it is otherwise provided by the terms of the agreement.[3] A general employment may carry with it a power of revo-

(*o*) Walsh *v.* Whitcomb, 2 Esp. 566.

(*p*) Mestaer *v.* Atkins, 5 Taunt. 381; Dalton *v.* Irvin, 4 C. & P. 289; Read *v.* Rann, 10 B. & C. 438; Broad *v.* Thomas, 7 Bing. 99.

(*q*) See Rogers *v.* Horn, 26 W. R. 432.

[1] Where it forms part of a contract it is usually made irrevocable in terms but in the absence of such, it is deemed irrevocable in law; Hunt *v.* Rousmanier, 8 Wheaton (U. S.), 174.

[2] When a mere power concerns the interest of the principal alone, it is revocable, notwithstanding the fact of an express declaration of irrevocability; Blackstone *v.* Buttermore, 53 Pa. St. 266; McGregor *v.* Gardner, 14 Iowa, 326. Upon revocation, the principal is liable for any money, time, or labor spent by the agent upon the business; Blackstone *v.* Buttermore, *supra*. A client is at liberty to change his attorney whenever he pleases; Trust *v.* Repoor, 15 How. Prac. (N. Y.) 570.

The attorney has a lien upon the papers in his possession, for costs and fees and under certain circumstances, he may be compelled to produce them upon an emergency requiring their use, *id.*

Where the commissions of an agent for sale depend upon his success in selling his power may be revoked before sale; Chambers *v.* Seay, 73 Ala. 372. When a principal, who has given a power of attorney to sell, himself sells and disposes of the thing, this amounts to a revocation of the power, by operation of law; Walker *v.* Deinson, 86 Illi. 142. See, also, Brown *v.* Pforr, 38 Cal. 550; Wells *v.* Hatch, 43 N. H. 246; Succession of Babin, 27 La. An. 114; Peacock *v.* Cummings, 46 Pa. 434.

[3] Blackstone *v.* Buttermore, 53 Pa. St. 266. Nor can an agent renounce his authority without first giving the principal notice, except for cause; if he does, he makes himself responsible for any loss which may be sustained by the principal in consequence of it; U. S. *v.* Leonard, Davies (U. S.), 274.

cation on payment only of a compensation for what may have been done under it; but there may also be a qualified employment under which no payment shall be demandable if the authority be countermanded. When the authority of the agent has been revoked, he will be entitled to damages only when the agreement so provides, or when the revocation is wrongful (*r*), or when his claim is supported by a custom.

Equitable assignments.]—A distinction must be made between a mere authority to pay money, which is revocable, *e. g.*, by an act of bankruptcy on the part of the principal, and an equitable assignment of such money (*s*).

Authority coupled with interest—Meaning of phrase.]—The Court of Common Pleas decided a case in the year 1848 (*t*), in which the nature of an authority coupled with an interest was elaborately discussed.[1] The result is summarized in clear terms in the judgment of the court, which was delivered by Chief Justice Wilde.

"But it is said," observed his lordship, "a factor for sale has an authority as such (in the absence of all special orders) to sell; and, when he afterwards comes under advances, he thereby acquires an interest, and having thus an authority and an interest, the authority becomes thereby irrevocable.

"The doctrine here implied, that, whenever there is in the same person an authority and an interest, the authority is ★irre- [★ 97] vocable, is not to be admitted without qualification. In the case of *Raleigh* v. *Atkinson* (*u*), goods had been consigned to a factor for sale, with a limit as to price. The factor had a lien on the goods for advances; and the principal in consideration of these advances,

(*r*) Simpson *v.* Lamb, 17 C B. 603.
(*s*) *Ex parte* Hall, *In re* Whiting, L. R., 10 Ch. D. 615.
(*t*) Smart *v.* Sandars, 5 C. B. 895. (*u*) 6 M. & W. 670.

[1] "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, a power coupled with an interest?"

Is it an interest in the subject on which the power is to be exercised or is it an interest in that which is produced by the exercise?

We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning.

A power coupled with an interest is a power which accompanies, or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest" an interest in that which is to be produced by an exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be coupled with it;" Chief Justice Marshall, in Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 203.

agreed with the factor that he should sell the goods at the best market prices, and realize thereon against his advances. The court held that this authority was revocable, on the ground that there was no consideration for the agreement. Now, in that case, there was an authority given, and one which the principal was fully at liberty to give; the party to whom it was given had an interest in it; yet the authority was held to be revocable." His lordship having examined this case more fully, and the cases of *Walsh* v. *Whitcomb* (*x*), *Watson* v. *King* (*y*), and *Gaussen* v. *Morton* (*z*), stated the result to be that, "where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable.

In a subsequent case before the Privy Council (*a*), the judge at the trial, on the authority of *Smart* v. *Sandars*, had directed the jury that, by the mere relationship of principal and factor for sale, the latter did not, by making advances, either at the time of his employment or subsequently, acquire any right in derogation of the rights of principal to give directions as to the time and manner of sale, and that any such right on the part of the factor must be made out by an agreement, which might be inferred from the evidence, or might exist impliedly by proof of usage. Their lordships upheld this direction, and in doing so, observed that mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot, according to the doctrine of *Smart* v. *Sandars*, have the effect of altering the revocable nature of an authority, unless such advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable. Such an agreement, however, might be express or inferred from the circumstances.

[★ 98] ★ *Authority to pay money—when irrevocable.*]—If a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority, if the obligation is incurred, to discharge it at the principal's expense, the moment the agent, on the faith of that authority, does the act, and so incurs the liability, the authority ceases to be revocable (*b*). So, too, where authority has been given previous to an act of bankruptcy by the bankrupts to their agent, in the course of mutual dealings, to receive the purchase-money of their estate, and to place it to account, and such authority

(*x*) 2 Esp. 565.
(*y*) 4 Camp. 272.
(*z*) 10 B. & C. 731.
(*a*) De Comas *v.* Prost. 3 Moo. P. C., N. S. 158.
(*b*) Per Hawkins, J., Reed *v.* Anderson, 10 Q. B. Div. 100; 48 L. T. 74; 52 L. J., Q. B. 214.

has been acted upon before notice of an act of bankruptcy, such authority is not revoked by the act of bankruptcy (*c*).

Rights flowing from special property in goods distinguished from authority coupled with interest.]—A distinction must be drawn between the rights which flow from such a special property in goods which an agent is employed to sell as entitles him to maintain an action against the buyer, and rights which flow from an authority coupled with an interest. In the former case the authority is revocable, in the latter it is irrevocable. This distinction was brought out clearly in *Taplin* v. *Florence* (*d*), in the year 1851. In that case it was argued that an auctioneer has an interest or special property in goods which are intrusted to him for sale, and, therefore, an irrevocable authority. In deciding that an auctioneer has no such irrevocable authority, Chief Justice Jervis distinguished the case of *Williams* v. *Millington* (*e*), on the ground that that case established a well-recognized principle, namely, that an auctioneer has a sufficient property in goods which he is employed to sell to maintain an action for such goods against a buyer; but all the learned judges were clear that his authority was not coupled with an interest.

Instances of authority coupled with interest.]—The following powers have been held to be authorities coupled with an interest, and irrevocable: An authority to sell premises, and to apply the proceeds in liquidation of a debt due to the donee of the authority and his partners (*f*);[1] an authority to sell certain shares of a ship ★ given by a person largely indebted to the donee of the [★ 99] power (*g*);[2] a power of attorney given as part of a security for money, or to effectuate any security (*h*)[3] an authority to sell in consideration of the agent forbearing to sue the principal for prior advances (*i*); a power of attorney executed for valuable consideration (*k*).[4]

(*c*) Elliot *v.* Turquand, 7 App. Ca. 79.
(*d*) 10 C. B. 744; cf. Roffey *v.* Henderson, 10 C. B. 744.
(*e*) 1 H. Bl. 81.
(*f*) Gaussen *v.* Morton, 10 B. & C. 731.
(*g*) Watson *v.* King, 4 Cowp. 272.
(*h*) Walsh *v.* Whitcomb, 2 Esp. 565; Drinkwater *v.* Goodwin, Cowp. 251.
(*i*) Per Parke, B., Raleigh *v.* Atkinson, 6 M. & W. 676.
(*k*) Bromley *v.* Holland, 7 Ves. 28.

[1] A power of attorney given to a third person to fix the price of goods sold in discharge of a debt. See Smyth *v.* Craig, 3 W. & S. (Pa.) 14. A verbal order, by principal to agent, in whose hands are funds belonging to principal, to pay a creditor, and the agent promises to do so, which is accepted and relied upon by the creditors, is irrevocable. Goodwin *v.* Bowden, 54 Me. 424.

[2] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 203.

[3] Knapp *v.* Alvord, 10 Paige (N. Y.), 205.

[4] For other cases see following: MacGregor *v.* Gardner, 14 Iowa, 326; Blackstone *v.* Buttermore, 53 Pa. St. 266; Chambers *v.* Seay, 73 Ala. 372; Hynson *v.* Noland, 14 Ark. 710; Hartley's Appeal, 53 Pa. St. 212; Barr *v.* Schroeder, 32 Cal. 609; Walker *v.* Dennison, 86 Ill. 142; Attrill *v.* Patterson, 58 Md. 226.

Agent appointed by articles of association.]—Lastly, cases may arise in which the appointment of the agent to act on behalf of a company is mentioned merely in the articles of association. A question was raised in a recent case with respect to the effect of a clause in the articles stating such appointment, and it was decided that articles of association state the arrangement between the members; they are an agreement *inter socios*, and do not constitute a contract between the company and third parties. Hence, when articles contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal businesss of the company, and should not be removed from his office except for misconduct, it was held that the plaintiff could not bring an action against the company for breach of contract in not employing him as solicitor (*l*). In the Court of Appeal, Lord Cairns reserved his judgment as to whether such a clause is obnoxious to the principles by which the courts are governed in deciding on questions of public policy, but observed that it was a grave question whether such a contract is one that the courts would enforce. It is probable, too, that the contract alleged by the plaintiff did not satisfy the Statute of Frauds.

Renunciation of agency.]—An agent may of course renounce his agency at any stage; but if the agency has been undertaken for a valuable consideration, he will be liable in damages to his principal, and the same rule will apply even in the case of gratuitous undertakings which have been performed in part by the agent (*m*).[1] A commissioned officer in the royal navy is not entitled, without permission from the Admiralty, to resign his commission and to leave his ship (*n*).

[★100] ★ SECT. 8—*By Operation of Law.*

General rule—Derivative authority expires with the original authority.]—The law with respect to the dissolution of the contract by operation of law has been summarized in the following terms by Mr. Justice Story: "A revocation by operation of law may be by a change of condition or of state, producing an incapacity of either party. This proceeds upon a general rule of law, that the derivative authority expires with the original authority from which

(*l*) Eley *v.* The Positive, &c. Assurance Co., 1 Ex. Div. 20, 88.
(*m*) See Chapter on Liability of Agent to Principal, Sect. 3.
(*n*) Reg. *v.* Cuming, 19 Q. B. Div. 13. See Parker *v.* Lord Clive, 4 Burr. 2419; and Vertue *v.* Lord Clive, *ib.* 2472.

[1] Where one voluntarily undertook to get a vessel insured, but neglected to do so, and the vessel was afterwards lost. * * * Held, he was not liable. Thorne *v.* Deas, 4 Johns (N. Y.), 84. Where defendant promises to insure for whole voyage, and only insured for part, he is liable. French *v.* Reed, 6 Binn. (Pa.) 358; White *v.* Smith, 6 Lans. (N. Y.) 5; Barrows *v.* Cushway, 37 Mich. 181; Gill *v.* Middleton, 105 Mass. 479.

it proceeds. The power of constituting an agent is founded upon the right of the principal to do the business himself; and when that right ceases, the right of creating an appointment, or of continuing the appointment of an agent already made for the same purpose, must cease also.[1] In short, the derivative authority cannot generally mount higher, or exist longer, than the original authority" (*n*).

Authority conferred by letter of attorney.]—In *Coombe's case* (*o*), it was resolved, that where a person has authority as an attorney to do an act, he must do it in the name of him who gave the authority; for he appoints the attorney to be in his place and represent his person. Hence, the attorney or agent cannot act in his own name, nor do it as his own act, but in the name and as the act of him who gave the authority. Hence, if a person has a letter of attorney to receive a testator's rents, this authority will be determined with the testator's death, being a mere naked authority (*p*). Mr. Justice Buller remarked, in *Salte* v. *Field* (*q*), that a question had been raised with respect to an agent acting under a power of attorney, whether acts which were done by him before he knew of the revocation of the power were good against the principal, and intimated that the principal in such a case could not avoid the acts of his agents done *bonâ fide* if they were to his disadvantage, though he might consent to waive such as were for his benefit. So in another case it is ruled that the credit arising from an ostensible employment continues (at least with regard to those who have been accustomed to deal on the faith of that employment) until they have notice of its being at an end, or till its termination is notorious.[2] It is said, however, that these principles ★ are true only of an agency terminated [★ 101] by express revocation, and not of an implied revocation by the death of the principal. Thus, Lord Ellenborough ruled, in *Watson* v. *King* (*r*), which was decided in 1815, that a power coupled with an interest cannot be revoked by the person granting it, but that it

(*n*) Story on Agency, sect. 481.
(*o*) 9 Rep. 76 b.
(*p*) Shipman *v.* Thompson, Willes, 105, n.
(*q*) 5 T. R. 214.
(*r*) 4 Camp. 272.

[1] Hunt *v.* Rousmanier, 8 Wheat. 174. Effect of war: The general rule is that it does not revoke an agency. Howel *v.* Gordon, 40 Ga. 302; Conn. *v.* Penn. 1 Pet. C. C. 496; Maloney *v.* Stephens, 11 Heisk. (Tenn.) 738; Darling *v.* Lewis, 11 Heisk. 125; Jones *v.* Harris, 10 Heisk, 98, but see, Insurance Co. *v.* Davis, 95 U. S. 425; Buchanan *v.* Curry, 19 Johns. 141; Conley *v.* Burson, 1 Heisk, 145; Robinson *v.* Ins. Co., 42 N. Y. 54; Sands *v.* Ins. Co., 50 N. Y. 626; Ins. Co. *v.* Warwick, 20 Gratt. (Va.) 614.

[2] Rice *v.* Barnard, 127 Mass. 241; Wright *v.* Herrick, 128 Mass. 240; Ins. Co. *v.* McCain, 96 U. S. 84; Hatch *v.* Coddington, 95 U. S. 48; Chapin *v.* Lenheim, 66 N. Y. 301; McNeilly *v.* Ins. Co., 66 N. Y. 23; Rice *v.* Isham, 4 Abb. App. 37; Braswell *v.* Ins. Co., 75 N. C. 8; Ulrick *v.* McCormick, 66 Ind. 243; Meger *v.* Hehner, 96 Illi. 400; Fellows *v.* —— Co., 38, Conn. 197; Eadie *v.* Ashbaugh, 44 Iowa, 519; Bank *v.* Vanderhorst, 32 N. Y. 553.

is necessarily revoked by his death, inasmuch as a valid act cannot be done in the name of a dead man.[1]

Naked authority revoked by death.][2]—In *Blades* v. *Free* (*s*), decided in 1829, a man who had cohabited for some years with a woman as his wife went abroad and died, the Court of King's Bench held that the woman might have the same authority to bind him for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although the goods were supplied before information of his death had been received. Mr. Justice Bayley said: "There is no doubt that a man may make an express contract for goods to be supplied to his wife or mistress after his death, for which his estate would be liable. But here there was no express contract. What, then, is the inference of law? That the woman had the same authority to bind the deceased by her contracts as if she had been his wife, and such an authority would be revoked by his death. It is said that this is hard upon the tradesman. But he trusts at his peril, whether the credit is given upon the order of a married woman or a mistress. If he is unwilling to run the risk, he should require an express contract; if he does not do so and sustains a loss, that is by reason of his own carelessness." A revocation of a bare authority by death is a very different thing from a revocation by the act of the party. In the latter case the plaintiff would undoubtedly be entitled to recover the reasonable expenses he might have incurred in endeavoring to execute the authority; but in the former, the failure would be the fault of no one; and whatever might be the expense incurred, the plaintiff could not recover against the administratrix (*t*). As to cases where there are current accounts between the principal and agent, and the latter receives money after the death of the former, see *Jeyes* v. *Jeyes* (*u*), *Spalding* v. *Thompson* (*v*), *Re* [★ 102] *Haselfoot's Estate* (*w*), *Ex parte The* ★ *National Bank* (*x*),

(*s*) 9 B. & C. 167.
(*t*) Per Crowder, J., in Campanari *v.* Woodburn, 15 C. B. 409.
(*u*) 45 L. J., Ch. Div. 245.
(*v*) 26 Beav. 636.
(*w*) L. R., 13 Eq. 327.
(*x*) L. R., 14 Eq. 516.

[1] The rule is the contrary in this country. See extract of the opinion of Chief Justice Marshall in Hunt *v.* Rousmanier, *ante*, page 96, note. Hackett *v.* Jones, 70 Ind. 227; Knapp *v.* Alford, 10 Paige (N. Y.), 205; Hess *v.* Rau, 95 N. Y. 359; Houghtailing *v.* Marvin, 7 Barb. 412; Varnum *v.* Meserve, 8 Allen, 158; Merry *v.* Lynch. 68 Me. 94; Goodwin *v.* Bowden, 54 Me. 424; Traverse *v.* Crane, 15 Cal. 12; Gilbert *v.* Holmes, 64 Illi. 548; Bonney *v.* Smith, 17 Illi. 531.

The interest necessary to render such a power irrevocable must be an interest in the subject upon which it is to operate, not an interest in that which is produced by the exercise of the power. Yerkes' Appeal, 99 Pa. St. 401.

[2] Peries *v.* Aycinena, 3 W. & S. (Pa.) 64; Turnan *v.* Temke, 84 Illi. 286; Johnson *v.* Wilcox, 25 Ind., 182; Lewis *v.* Kerr, 17 Iowa, 73; Marlet *v.* Jackmen. 3 Allen 287; Saltmarsh *v.* Smith, 32 Ala. 404; Clayton *v.* Merrett, 52 Miss. 353; Wilson *v.* Edmonds, 24 N. H. 517; Ins. Co. *v.* Leavenworth, 30 Vt. 12; Davis *v.* Bank, 46 Vt. 728; Est. of Rapp *v.* Ins. Co., 113 Illi. 390.

Lambarde v. *Older* (*y*), *Rees* v. *Watts* (*z*), *Schofield* v. *Corbett* (*a*), *Mardall* v. *Thelluson* (*b*). As to sales of ships by agents of deceased principal, see Merchant Shipping Act, 1854, s. 81. As to payments by trustees, executors, and administrators, to agent of deceased principal, see 22 & 23 Vict. c. 35, s. 26. As to forms of powers of attorney used by the Bank of England, see *Kiddell* v. *Farnell* (*c*). As to purchases under powers created by instruments executed after the 31st December, 1882, see the Conveyancing Act, 1882, s. 8.[1]

Bankruptcy of giver of a power of attorney—General rule]—As a general rule, a power of attorney is revoked by an act of bankruptcy committed by the giver of the power, as against the trustees under a subsequent bankruptcy; still, if after the act of bankruptcy, but before the adjudication, property is conveyed under the power to a *bonâ fide* purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. A power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and wherever a sale would be binding on a bankrupt if no adjudication follows, it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of the act of bankruptcy having been committed by the seller at the time of the sale (*d*).

Effect of principal's bankruptcy generally.]—The authority of an agent is, as a rule, determined by the bankruptcy of his principal, and in the absence of evidence that the trustee of the bankrupt has invested the agent with authority to act for him, or that the authority of the agent is coupled with an interest, the agent has no authority to receive money due to the principal, or to pay away his money (*e*)[2]. In a case (*f*) where, upon the bankruptcy of an underwriter, the question was whether the authority of an insurance broker to settle losses on his behalf and apply the premiums in hand to the satisfaction of the just claims of the assured was not at an end, it was observed by the ★ court that "inasmuch [★ 103] as the bankrupt was not competent after his bankruptcy to pay or apply this fund himself in satisfaction of these claims of the

(*y*) 17 Beav. 542.
(*z*) 11 Ex. 410.
(*a*) 11 Ad. & E. 779.
(*b*) 21 L. J., Q. B. 410.
(*c*) 26 L. J., Ch. 818.
(*d*) Per Curiam, *Ex parte* Snowball, *Re* Douglas, L. R., 7 Ch. 548; see Hovill v. Lethwaite, 5 Esp. 158; and Elliott v. Turquand, 51 L. J., P. C. 1; 45 L. T. 769.
(*e*) Minett v. Forrester, 4 Taunt. 541; Drinkwater v. Goodwin, Cowp. 251.
(*f*) Parker v. Smith, 16 East, 382.

[1] As to when a warrant of attorney is sufficient to authorize entry of judgment. Cooper v. Shaver, 101 Pa. St. 547.

[2] *In re* Daniels 13 National Bank Reg., 46; Ogden v. Gillinghan, Baldwin (U. S.), 38; Audenried v. Bettley, 8 Allen (Mass.), 302.

assured, it followed, as a consequence, that he could not authorize his broker so to do; otherwise the derivative and implied authority would be more extensive than the original and principal authority of the party himself, which cannot be." The consequence is that the authority of the agent, the broker, was virtually countermanded and extinct by that act of bankruptcy by which the bankrupt's own original power over the subject-matter ceased and became transferred to others. Hence a broker who is indebted to assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy is not entitled to set off returns of premiums due upon the arrival of ships which have arrived since the bankruptcy (*g*).

Sales by factors.]—In *Drinkwater* v. *Goodwin* (*h*), decided in 1775, one Jeffries, a factor, sold as factor certain goods to the defendant. After the sale his principal became bankrupt, and the assignees gave notice to the defendant not to pay over the money to Jeffries. The defendant nevertheless paid over the money, and Jeffries claimed it as having a lien upon it. The court took time to consider its decision, and ultimately gave judgment for the defendant, treating the case as one in the nature of a bill of interpleader, and the defendant as the stakeholder. "We are all most clearly of opinion," said Lord Mansfied, "that a factor has a lien on the price of the goods in the hands of the buyer; and in this case, though he had not the actual possession of them, yet, as he had a power of giving a discharge, or bringing an action, he had a right to retain the money, in consequence of his lien, as much as a mortgagee has by the title-deeds of an estate in his hands, though he is not in possession." There was an agreement that the factor should have a lien in consideration of becoming surety for the principal.[1]

The right of set-off in bankruptcy.]—The principle of set-off in bankruptcy has, according to a high authority (*i*), been explained with great clearness by Baron Parke in the case of *Forster* v. [★ 104] ★ *Wilson* (*k*) in the following words: "The right of set-off in bankruptcy does not appear to rest on the same principle as the right of set-off between solvent parties. The latter is given by the statutes of set-off to prevent cross actions; and if the defend-

(*g*) Goldschmidt *v.* Lyon, 4 Taunt. 534.
(*h*) Cowp. 251.
(*i*) Lord Cairns, in *Ex parte* Cleland, L. R., 2 Ch. 808.
(*k*) 12 M. & W. 203.

[1] "Express or tacit revocation by act of the principal, or by death, bankruptcy or insanity, will have no effect, either to deprive the factor of the benefit of his authority in extricating himself from transactions already begun, or from the consequences of his having acted; or to deprive others, who have relied upon his powers, of the benefits of the transactions on which they have previously entered with him; or even to disturb transactions entered into while he still appeared to hold his authority undiminished." 1 Bell Comm. 489 (5th ed.).

ant could sue the plaintiff for a debt due to him, not in his representative character, he might set it off under these statutes in an action by the plaintiff suing in his individual character also, though the plaintiff or defendant might claim their respective debts as a trustee for a third person. If the debts were legal debts, due to each in his own right, it would be sufficient. But, under the bankruptcy statutes, the mutual credit clause has not been so construed. The object of this clause is not to avoid cross-actions—for none would lie against assignees, and one against the bankrupt would be unavailing—but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debter to his estate; and the Court of Queen's Bench, in construing this clause, have held that it did not authorize a set-off where a debt, though legally due to the debtor from the bankrupt, was really due to him as a trustee for another, and, though recoverable in a cross action, would not have been recovered for his own benefit."

Mutual claims and dealings.]—The introduction of the words mutual credit extends the right of set-off to cases where the party receiving the credit is not debtor *in præsenti* to him who gives the credit (*l*). A difference in the nature of the cross claims is immaterial, provided they are liquidated (*m*). By the introduction of the words mutual dealings, all claims provable in bankruptcy would seem to be the subject of set-off. As a rule, there can be no mutuality within the section, unless the dealing which is set-off, and the dealing against which it is set off, are between the same parties (*n*), and unless they are dealings in the same right, as for instance, when debts are set off (*o*). This rule is not at variance with the recognized rule, that a debt due to an agent on a contract made on behalf of an undisclosed principal, may be set off by an agent against a debt due from him in his own person. The agent, in such a case, is himself a contracting party, and being liable personally on the ★ contract, is entitled also to the benefit of his privity [★ 105] of contract with the bankrupt (*p*).

Appropriation of goods or money.]—The effect of another rule where bankruptcy intervenes remains to be considered, namely, that where a firm consisting of A. and B. receives goods or money for a particular purpose, such appropriation cannot be defeated by a firm consisting of A. and C.

A. was partner with B. in one mercantile house, and with C. in another. A. and B. indorsed a bill of exchange to A. and C. Subsequently B., acting for the house of A. and B., receives securities from the drawer of the bill upon agreement by B. that the bill should be taken up and liquidated by B.'s house, and if not paid

(*l*) Per Lord Brougham, in Young *v.* Bank of Bengal, 1 Moo. P. C. 150.
(*m*) *Ex parte* Ruffle, L. R., 8 Ch. 997.
(*n*) New Quebrada Co. *v.* Carr, L. R., 4 C. P. 651.
(*o*) Gale *v.* Luttrell, 1 Y. & J. 180.
(*p*) Lee *v.* Bullen, 27 L. J., Q. B. 161.

by the acceptors when due should be returned to the drawer. The securities were paid, the money being received by B. The court held that, as B. received the money in satisfaction of the bill, A. was bound by this act of his partner B., and that he could not in conjunction with C. contravene his own act and sue upon the bill, which had been already satisfied as to him (*q*). So where A. and B. agreed to make advances to D. against certain consignments, and that the proceeds of sale above the advances should go to the liquidation of an old claim of A. and C. against D., D. accordingly directed his consignees to remit to A. and B., and A. and B. made advances to D. by drawing on him, negotiating his acceptance, and remitting the proceeds to him. A. and B. afterwards directed the consignees to remit not to themselves but to B. and C.—C. being a partner common to both firms—as a security for advances made by B. and C. to A. and B. A. and B. became bankrupt, and Vice-Chancellor Wickens held that B. and C. had notice of the arrangement between D. and A. and B. through the fact of a common partner, and that, upon the construction of the contract, the remittances in the hands of B. and C. were appropriated first to the payment of D.'s acceptances and, subject thereto, to the discharge of the old claims (*r*).

This subject cannot be passed over without a reference to sect. 38 of the Bankruptcy Act, 1883, which provides that where there have been mutual credits, mutual debts or other mutual dealings between a debtor, against whom a receiving order has been made, and any other per- [★ 106] son proving or claiming to prove ★ a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him (*s*).

Bankruptcy of agent Exceptions to the rule.]—The bankruptcy of an agent operates as a revocation of his authority (*t*), except in cases where the authority is merely to do a formal act which passes no interest, the performance of such act being incumbent upon the agent (*u*).

Summary.]—With respect to the effect of the bankruptcy of the agent upon the principal's rights the authorities may be summarized in the following rules:

(*q*) Jacaud *v.* Canning, 12 East, 317.
(*r*) Steele *v.* Stuart. L. R., 2 Eq. 84.
(*s*) Bankruptcy Act, 1869, s. 39.
(*t*) Hudson *v.* Granger, 5 B. & Ald. 27; Godfrey *v.* Furzo, 3 P. Wms. 185.
(*u*) Dixon *v.* Ewart, 3 Mer. 322; Alley *v.* Hotson, 4 Camp. 325; Robson *v.* Kemp, 4 Esp. 233.

(1.) The order and disposition clause of the Bankruptcy Act, 1869 (sect. 15, sub-sect. 5) did not apply—

(a) To property in possession of a person as factor (*x*).

(b) To property, money, bills, or goods in the hands of the bankrupt for a specific purpose (*y*).

(2.) If the person in possession of the property remitted to him for a special purpose has a lien upon it, the trustee has a good claim against the remitter to the extent of such lien (*z*).

(3.) If such property has been wrongfully disposed of, the principal may follow the proceeds so long as they are distinguishable (*a*).

(4.) If the property is mixed by the agent with his own, the whole becomes liable to satisfy the trusts (*b*).

(5.) Notice of the trust, or of a specific appropriation, will defeat the title of third parties who deal with the ★ property inconsistently with such trust or [★107] appropriation (*c*).

(6.) When a person pays money into a bank to be applied in a specific manner, and the banker stops payment before taking any step towards applying it to the purpose, the payer cannot recover the money paid, but has merely a right of proof as a general creditor (*d*). But where the country bank has applied the money, and the town agent has received it for the specific purpose, the payer may recover (*e*).

Property of bankrupt divisible amongst creditors.]—The Bankruptcy Act, 1883, s. 44, provides that the property of the bankrupt divisible amongst his creditors shall include:

(1.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice (sub-sect. 2).

(2.) All goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to him in the course of his trade or business, shall not be deemed goods within the meaning of this section (sub-sect. 3).

(*x*) Whitfield *v.* Brand, 16 M. & W. 282.
(*y*) Tooke *v.* Hollingsworth, 5 T. R. 227; and cases *infra*.
(*z*) Drinkwater *v.* Goodwin, Cowp. 256.
(*a*) Frith *v.* Cartland, 34 L. J., Ch. 301.
(*b*) *Ibid.*
(*c*) Steele *v.* Stuart, L. R., 2 Eq. 84; and cases *infra*.
(*d*) *Re* Barnard's Banking Co. (Limited), Massey's case, 39 L. J., Ch. 635, 759.
(*e*) Farley *v.* Turner, 26 L. J., Ch. 710.

By the Act of 1883 the distinction between traders and non-traders so far as regards their liability to be made bankrupt, is abolished (sect. 4); but the distinction still holds in the order and disposition clause (sect. 44).

Traders within the Bankruptcy Acts, 1869 and 1883.]—Brokers, bankers, and persons who, either as agents or factors for others, seek their living by buying and selling, or buying and letting for hire, goods or commodities, were traders within the Bankruptcy Act, 1869 (sect. 1). In a very early case on the Bankruptcy Laws (*f*), it was [★ 108] held that the statute 21 Jac. 1, c. 19, ★ s. 11, did not extend to the case of factors who have the possession of other men's goods merely as trustees, or under a bare authority to sell for the use of their principal. The goods must be such as the party suffers the trader to sell as his own. In a luminous exposition by Lord Redesdale of the corresponding Irish Act, it was said that the "clause refers to chattels in the possession of the bankrupt in his order and disposition, with consent of the true owner. That means where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from his visible possession of property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner" (*g*). As soon as it appears to be a branch of a person's business to sell the goods of others on commission, that establishes him to be a factor (*h*). Hence, if it is commonly known that a man is acting as factor to another, the book debts owing to the factor on behalf of his principal will not pass to the trustee of the bankrupt's estate any more than goods consigned by the plaintiff to the factor for sale (*i*). The decision of Lord Hardwicke in *Copeman* v. *Gallant* (*k*) may be sustained upon the above principle (*l*). The distinction drawn by Lord Chancellor King in a case decided in 1733 (*m*), was that if A. sent goods to B. to the use of B., and before those goods were paid for B. dies insolvent, A. cannot have his goods again; whereas if A. sends goods to C., a factor, to dispose of them to A.'s use, and C. becomes a bankrupt, these goods are not liable to the debts of the bankrupt.

Goods in the hands of, and remittances sent to, agent for specific purpose.]—If goods and chattels are in the possession of an agent for any specific purpose, and the agent become bankrupt, such goods

(*f*) Mace *v.* Cadell, Cowp. 232.
(*g*) Joy *v.* Campbell, 1 Sch. & Lef. 336.
(*h*) Whitfield *v.* Brand, 16 M. & W. 282, per Pollock, C. B.
(*i*) *Ex parte* Boden, *Re* Wood, 28 L. T. Rep., N. S. 174.
(*k*) 1 P. Wms. 314.
(*l*) *Ex parte* Enderbey, 2 B. & C. 389.
(*m*) Godfrey *v.* Furzo, 3 P. Wms. 185.

or chattels do not pass to the trustee in bankruptcy. Thus, where A. and B., partners, were consignees of the produce of an estate, and in that character became creditors of the estate, the ★ es- [★ 109] tate having been conveyed to certain trustees, A. and others, for the purpose of applying the proceeds to the payment amongst others of the debt due to A. and B.; A. and B. assign this debt to C. and Co., and subsequently become bankrupts; at the time of the bankruptcy a consignment of sugar is in the docks in their name, soon after the bankruptcy another consignment arrives in their name; both consignments are taken possession of by the assignees; but it was held that the sugars came to the hand of A. and B. clothed with a trust to pay the proceeds to A., as trustee, and that they must be applied to pay off the debt assigned to C. and Co. and in discharge of the other trusts of the deed, A. being affected with notice to A. and B. of the assignment of their debt (*n*). A rule laid down in 1711 (*o*) was to the effect that if one employs a factor and entrusts him with the disposal of merchandise, and the factor receive the money, and dies indebted in debts of a higher nature, and it appears that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor had the money it shall be looked upon as the factor's estate (*p*).

If a remittance is sent to an agent for a particular purpose, whether it is a remittance by bill or a remittance in money, the agent who receives the remittance must either apply it for the purpose for which it is sent, or else return it (*q*). So, if goods are sent to a factor to be disposed of, and he afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of the property, the principal may recover the goods in specie and is not driven to a necessity of proving his debt. If, on the other hand, the goods are sold and reduced to money, provided that money is distinguishable from the factor's other property, the rule is the same. This rule of law had been so frequently decided at an early period, that it was accepted as an uncontrovertible point at least as early as last century (*r*). Vice-Chancellor Wood, in a case decided in 1866 (*s*), made some observations in which the distinction that obtains is well brought out. "I cannot," said his honour, "conceive a case more simple ★ than that in which a man [★ 110] places goods in the hands of a mere agent, and says, 'Sell these goods for the best amount you can, because I want to raise money upon them, and remit me the proceeds.' If the agent fails, everybody who buys from the agent has a perfectly good title, of course.

(*n*) *Ex parte* Smith, 4 D. & C. 579.
(*o*) Whitcomb *v.* Jacob, 1 Salk. 160.
(*p*) See Zinck *v.* Walker, 2 W. Bl. 1154.
(*q*) See per Mellish, L. J., Vaughan *v.* Halliday, L. R., 9 Ch. 561.
(*r*) See per Lord Kenyon, Took *v.* Hollingsworth, 5 T. R., 227.
(*s*) Steele *v.* Stewart, L. R., 2 Eq. 84.

Although you know he is an agent, you have a right to regard him as an agent with full authority; on the other hand, if you know he is a mortgagee, and has only a qualified interest, and is under an obligation to apply the proceeds in a given way, you may take the pledge for him, but you take the pledge on the terms of applying it as he was bound to apply it, and if there is any surplus you will get it."

Test to determine whether there has been a specific appropriation of bills.]—The test by which to determine whether there has been such a specific appropriation as would enable a principal upon the bankruptcy of his agent to claim such goods or chattels was stated in a case decided in the year 1794 (*t*). In the course of the argument in that case, Mr. Justice Buller stated the law to be that, in order to make out a specific appropriation of bills, there must be a lodgment of a bill for a bill, or at least several deposited at once as one entire transaction. It is not enough that bills are paid in on a general running account. Lord Kenyon agreed with this statement.

In a well-considered case (*u*), which was determined the year previous, the question was elaborately discussed. An agreement had been entered into between A. and B. that B. should purchase of A. all the light gold coin which he could send at a stated price, and that A. should from time to time draw upon B. for the money upon such sale; and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value. After they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a parcel of light gold and bills to enable B. to discharge the acceptances. This parcel was taken by B.'s assignees, but the court held that A., who had paid B.'s acceptances, might recover back the gold and bills sent after the bankruptcy, inasmuch as this had been sent for the particular purpose of paying these acceptances.

[★ 111] ★ *Remittances of bills of exchange.*]—If bills of exchange are sent by a correspondent of a merchant to be received, and the money to be applied to a particular use, and the merchant becomes bankrupt before the money is received on the bills, the correspondent has a specific lien in respect of those bills, and the proceeds will not be divided amongst the creditors at large (*x*). It is otherwise where the bills are sent on a general account (*y*).

Where short bills are remitted to a banker on a general account, they cannot, on his bankruptcy, be claimed by the remitter; but if remitted for a particular purpose, they must be applied to that purpose (*z*).

(*t*) Bent *v.* Puller, 5 T. R. 493.

(*u*) Tooke *v.* Hollingsworth, 5 T. R. 215.

(*x*) *Ex parte* Dumas, 2 Ves. sen. 582; Zinck *v.* Walker, W. Bl. 1154; Tooke *v.* Hollingsworth, 5 T. R. 215; Parke *v.* Eliason, 1 East, 544; *Ex parte* Oursell, Amb. 297.

(*y*) Bent *v.* Puller, 5 T. R. 493; Bolton *v.* Puller, 1 B. & P. 539.

(*z*) *Ex parte* Pease, 19 Ves. 60; *Ex parte* Rowton, 1 Rose, 15.

Bills deposited with banker.]—Where indorsed bills of exchange are deposited by a customer with a banker, the latter has the absolute power of disposing of them; and in the event of his bankruptcy, though the customer might recover such bills as remained in specie, subject to the banker's lien for the balance of his account, yet he cannot follow the proceeds if they have been converted. Such absolute property, however, may be qualified by circumstances, as where the banker is agent for his country correspondent to receive and pay bills for him, with an allowance for so doing; or where, in an annual account stated between them, the banker has entered the bills as the property of the correspondent. In the one case the latter is considered as a factor, and the bills are remitted for a particular purpose, viz., to be received and carried to account as cash when due. The banker's power over them is in that case limited. In the other case an express declaration of trust is raised(*a*). So short bills are to be delivered up upon a bankruptcy, subject to the bankrupt's lien, and an indemnity to the estate against the engagements on account of the party claiming them. Whether bills are to be considered short or not does not depend upon the particular mode of entering them in the banker's books, but upon the mode of dealing between the parties, and all the circumstances together (*b*).

Trust property—Right to follow.]—It is well established that, as between *cestui que trust* and trustee, and all parties claiming ★ under the trustee, otherwise than by purchase for valu- [★ 112] able consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature, or character, and all the fruit of such property, whether in its original or its altered state, continue to be subject or affected by the trust.[1] Lord Justice Turner has given an instance of what in his opinion is the most perfect instance of the extent to which the doctrine of following trust property has been carried, and of the difficulties with which the court has grappled (*c*). An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them. The capital itself may consist only of the balance which at the death of the partner was due to him as the result of the partnership account; the capital may have no existence but in the stock-in-trade and debts of the partnership; the stock-in-trade may undergo a con-

(*a*) *Ex parte* Pease, *Re* Boldero, 1 Rose, 232.

(*b*) *Ibid.*

(*c*) Pennell *v.* Deffell, 4 De G., M. & G. 372; 23 L. J., Ch. 115. See Birt *v.* Burt, 36 L. T. 943; Frith *v.* Cartland, 4 Ch. Div. 123; Newell *v.* Nat. Prov. Bank of England, 1 C. P. D. 496.

[1] Harrisburg Bank *v.* Tyler, 3 W. & S. (Pa.) 373; Day *v.* Roth, 18 N. Y. 448; Pugh *v.* Pugh, 9 Md. 132; King *v.* Hamilton, 16 Ind. 190; Coder *v.* Huling, 3 Casey, 84; Pugh *v.* Currie, 5 Ala. 446; Church *v.* Sterling, 16 Conn. 388; Eshelman *v.* Lewis, 13 Wright (Pa.), 410; Follanshe *v.* Kilbreth, 17 Illi. 522; Chastain *v.* Smith, 30 Ga. 96; Harper *v.* Archer, 28 Miss. 212; Shelton *v.* Lewis, 27 Ark. 190; Wallace *v.* McCullough, 1 Rich. Eq. (S. C.) 426.

tinual course of change and fluctuation: and yet the court follows the trust capital throughout all its ramfications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed.

Vice-Chancellor Page Wood has stated the rule to be as follows: "A trustee or person in the position of trustee can never assert a title of his own to trust property. He may destroy that property and render himself liable in consequence. If it is stock he may sell that stock and invest the proceeds in other property. If he destroys the trust fund by paying away the money, the trust is at an end; but if he invests it in other property, and that can be traced, he is still in possession of the trust property, and to that he can never assert a right. Another principle is, that if a person, having trust property and property of his own, chooses to mix the two together, the whole becomes trust property, subject to the qualification that whatever he can distinguish as his own he may take out; whatever he cannot distinguish remains for the benefit of the trust until that trust is satisfied: at all events the trust must be satisfied before the trustee who has mixed the two funds can have a shilling paid to him (*d*).[1]

Marriage of feme sole.]—The marriage of a *feme sole* at common law operates as a revocation of the authority of any agent who [★ 113] ★ has acted for her, although such authority has been conferred by deed (*e*).[2] Hence, a submission by a woman to arbitration was revoked by her marriage before the award was made (*f*).

Effect of lunacy of principal upon contract of agent.][3]—All the authorities with reference to the effect which the lunacy of the principal has upon the contracts of an agent appointed when the principal was sane were examined in 1879 by the Court of Appeal in *Drew* v. *Nunn* (*g*). The action was brought to recover the price of boots and shoes supplied by the plaintiff to the defendant's wife. The defendant, when sane, gave to his wife an absolute authority to act for him, and held out to the plaintiff that he had given his wife that authority. The defendant afterwards became so insane that he could not have contracted with anyone on his own behalf.

(*d*) Frith *v.* Cartland, 34 L. J. Ch. 301.
(*e*) Charnley *v.* Winstanley, 5 East, 266.
(*f*) M'Can *v.* O'Ferrall, 8 Cl. & F. 20.
(*g*) 4 Q. B. D. 661; 48 L. J., Q. B. 591; 40 L. T. 671; 27 W. R. 810.

[1] Com. *v.* McAllister, 4 Casey (Pa.), 480; McAllister *v.* Com., 6 Casey 536; School *v.* Kirwin, 25 Illi. 73; Kip *v.* Bank of New York, 10 Johns. 65; Thompson's Appeal, 10 Harris (Pa.), 16; McLarren *v.* Brewer, 51 Me. 402; Seamen *v.* Cook, 14 Illi. 505; Day *v.* Roth, 18 N. Y. 456; Wallace *v.* McCullough, 1 Rich. Eq. (S. C.) 426.

[2] If the *feme sole* is an agent, her marriage does not *per se* revoke the agency; much less so if her power if coupled with an interest, in which case it is irrevocable. Story on Agency, § 485.

A power of attorney to sell land, given by a single man, is revoked by his marriage. Henderson *v.* Ford, 46 Tex. 627.

[3] Story on Agency, §§ 481, 484.

When he was in that condition the wife ordered the goods, and they were supplied by the plaintiff, who had no notice of the husband's lunacy. He subsequently recovered his reason, and this action was brought against him. He defended on the ground that his lunacy put an end to his wife's authority. Mellor, J., directed the jury that the plaintiff was entitled to recover. The Court of Appeal, consisting of Brett, Bramwell, and Cotton, L. JJ., made an order *nisi* for a new trial on the ground of misdirection, but after taking time to consider its judgment, the court discharged the order. Brett, L. J., confessed that he had found the doctrine applicable the most difficult, and the least to be satisfactorily explained, doctrine he had ever met with in the English law, and found no satisfactory conclusion in Story or in any Scotch or French authority. In considering the ground upon which the plaintiff was entitled to recover, his lordship said, "A person who deals with the agent without knowledge of the principal's lunacy has a right so to deal, and the lunatic is bound by having held out the authority of the agent . . . because of a representation made by the principal, when he was sane and could make it, to an innocent party, upon which the latter has a right to act until he knows of the lunacy."

Two propositions of law may be deduced from *Drew* v. *Nunn* (*h*).

★ That the lunacy of the principal in certain cases puts [★ 114] an end to the agent's authority.

In what cases? Notwithstanding the decision of the Court of Appeal, that question may still be regarded as an open one. Three answers are given by the Lords Justices.

The first answer is that of Brett, L. J.:—

"Where there is lunacy like that in the present case—lunacy so great that the person who suffers from it has no contracting mind, *and cannot contract or do* any legal act for himself for want of mind—then as the principal at law is incapable of doing the act for himself, his agent cannot do it for him." Mere weakness of mind is not sufficient.

Bramwell, L. J., took a different view. "Brett, L. J.'s, judgment," said his lordship, "has proceeded on the ground that the defendant was in such a state of insanity that the insanity itself was a revocation. Now I am not prepared to say every case of insanity would be sufficient to revoke the authority. I should think the insanity must be something approaching *dementia* in order to do so. *If the defendant, for instance, had known that his wife was pledging his credit*, I do not think that because he was insane, he would have ceased to be liable."

Cotton, L. J., reserved to himself the right to consider in the future whether or not the authority can be put an end to in cases like *Drew* v. *Nunn* until there has been a commission of lunacy.

The second proposition of law is:—

(*h*) *Ubi supra.*

(2.) That where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic or insane, he is liable on contract made by the agent, after the lunacy or insanity, with a person to whom the authority has been so held out, and who had no notice of the lunacy or insanity.

All the Lords Justices were agreed upon this proposition. Knowledge of the lunacy is notice of the revocation of the agent's authority.

It would seem, according to Brett, L. J., that the answer to the first question depended upon the lunatic's capacity to *do* a legal act: Bramwell, L. J., thought it depended upon his capacity to *know* or understand that the act was being done on his behalf; and Cotton, L. J., looking neither to the lunatic's capacity to act, nor [★ 115] to the state of his mind, apparently ★ attached more importance to the consideration whether there had been a commission of lunacy.

The solution of this question is of importance:—

(a) Where the agent deals with a third person for the first time, or where there has been no holding out by the principal.

(b) Where an agent is threatened with an action for breach of duty in assuming to exercise an authority which had determined.

It is of no importance where an agent has been held out by the principal as having authority. He may be held out in one of two ways. First, where some instrument, *e. g.*, a power of attorney, asserts that the agent has the authority; and, secondly, where the principal, when sane, represented, expressly or impliedly, that the agent had authority to act for him in particular cases (*i*).

Insanity of partner.]—In *Sayer* v. *Bennet* (*j*), which came before Sir L. Kenyon, M. R., in 1764, his lordship intimated that when partners are to contribute skill and industry as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes, and dissolve the partnership; but that the dissolution could not take place with a view to the commencement of the disorder. An inquiry was directed whether the partner was in such a state of mind as to be capable of conducting the business.

Sir John Leach laid down the law in a subsequent case (*k*), which was decided in 1833, to the effect that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement, is a ground for determining the contract. Hence, if a partner becomes insane, the partnership does not become *ipso facto* dissolved, but the insanity is merely ground for a dissolution.

(*i*) See the judgment of Brett, L. J., in Drew *v.* Nunn, *ubi supra.*
(*j*) 1 Cox, 107.
(*k*) Jones *v.* Noy, 2 Myl. & K. 25.

Insanity of agent.]—An idiot, lunatic, or person otherwise of unsound mind, cannot do any act as an agent binding upon the principal (*l*). The case of the insanity of the agent would seem to constitute a natural as well as a necessary revocation of his authority, for the principal cannot be presumed to intend that acts done for him and to bind him shall be done by one ★ who is incom- [★ 116] petent to understand or to transact the business which he is employed to execute. The exercise of sound judgment and discretion would seem to be required, in all such cases, as preliminaries to the due exercise of the authority (*m*).

Appointment of a manager and receiver of business of the principal by the Chancery Divison.]—As to the effect of such appointment upon the contracts of persons in the employ of the principal, see *Reid* v. *The Explosives Co.* (*n*), and *Gardner* v. *London, Chatham & Dover Ry. Co.* (*o*). As to the effect of appointing liquidators, see *In re English Joint Stock Bank* (*p*); *In re Oriental Bank Corporation, M'Dowall's case* (*q*).[1]

Destruction of subject-matter of the agency.]—Lastly, the authority of an agent is determined by the destruction of the subject-matter of the agency, or by the determination of the principal's power over it. Thus, if the agent is commissioned to sell a ship which is subsequently destroyed by fire, or goods which are jettisoned, or a racehorse which dies—in all these cases his authority is at an end. So, if the agent sells according to his authority (*r*), or if the principal's authority over the subject-matter of the agency is ousted by a paramount authority.

(*l*) See Britt. c. 126; Shelford's Law of Sureties, 618.
(*m*) Story, sect. 487.
(*n*) 19 Q. B. D. 264.
(*o*) L. R., 2 Ch. 201.
(*p*) L. R., 3 Eq. 341.
(*q*) 32 Ch. Div. 368.
(*r*) Seton *v.* Slade, 7 Ves. 276.

[1] Story on Agency, § 487.

[★ 117]

★BOOK II.

OF THE AUTHORITY CONFERRED.

PART I.

Of the Nature and Extent of the Authority.

CHAPTER I.

AUTHORITY GENERAL AND SPECIAL.

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Various kinds of authorities—express—implied—general—special.]—An authority is, as to its nature, either express or implied; as to its extent, it is either general or special.[1] We shall first consider what is meant by the terms a special authority and a special authority. There is little difficulty in understanding the ordinary meaning of those terms. Some confusion, however, is apt to arise from the fact that what is a special authority as between the principal and the agent may be a general authority when third parties are concerned. This consequence is due to the operation of the rules established with respect to the effect upon the principal's liabilities of allowing the agent to assume wider authority than his express instructions warranted, these instructions being unknown to third parties. Taking the terms as they stand, a general author- [★ 118] ity may be defined as an authority ★ to act in a certain character; and a special authority as an authority to do a particular act. In the former case the authority—unless it is restricted to a smaller limit, and the restriction is known or ought to be known to third parties—carries with it all the ordinary powers incident to

[1] Also universal agents, which should be distinguished from general agents. They may be defined as those who are empowered to do all the acts which the principal can do personally, and which he may lawfully delegate the power to another to do. The law will not infer the existence of such an ageney from general expressions. Story on Agency, § 21.

that character; whilst in the case of a special authority, the agent's power is directly derived from the principal, and limited accordingly.[1] This appears to be the fundamental distinction between the two kinds of authority. In practice, nevertheless, it often becomes a matter of difficulty to determine whether an authority is special or general. And in order to determine whether or not a principal is liable it may be necessary to consider, first, whether the agent's authority was general or special; and, secondly, whether his acts were within the apparent scope of his authority. The remarks of the judges and text-writers express with sufficient clearness the meaning of the above expressions. They are almost uniform in distinguishing between an authority to do a single act and an authority to do all acts connected with a particular employment. This will be evident from a few instances.

General and special or particular authority.]—The distinction drawn by Lord Ellenborough between a general and special or particular authority is that the former imports not an unqualified authority, but an authority which is derived from a multitude of instances, whereas the latter is confined to an individual instance (*a*). The distinction drawn by Paley is that an authority is general or special with reference to its object, *i. e.*, according as it is confined to a single act, or is extended to all acts connected with a particular employment (*b*). Story adopts the same distinction. A special agency properly exists where there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment (*c*). Again, it is said by a learned writer that a comparison of the various dicta and decisions would seem to lead to the conclusion that by the term general agent, in our law, is meant, either first, a person who is appointed by the principal to transact all his business of a particular kind; or, secondly, an agent who is himself engaged in a certain trade or business, and who is

(*a*) Whitehead *v.* Tuckett, 15 East, 408 (decided in 1812).
(*b*) Paley on Ageney, 2. (*c*) Story on Agency, sect. 17.

[1] Where the business of a husband was managed by his wife, and she with his knowledge and consent, signed notes and checks in his name in the course of the business, his liability upon such notes and checks given in the course of the business will result from such general authority; but his liability upon such notes will not extend beyond those given in the ordinary course of business, such as accommodation paper signed by her in his name, but without his knowledge and consent. Gulick *v.* Grover, 33 N. J. L., 463.

A general agency may be inferred from facts and circumstances. Lyell *v.* Sanborn, 2 Mich. 109.

The usages of a particular trade or business are admissible for the purpose of interpreting the powers of an agent. Nat. Furnace Company *v.* Keystone Mfg. Co., 110 Ill. 427. To same effect, Crain *v.* Nat. Bank of Jacksonville, 114 Ill. 516; U. S. Life Ins. Co. *v.* Advance Co., 80 Ill. 549. See also Metin *v.* Farnsworth, 49 N. Y., 555; Ladd *v.* Franklin, 37 Conn. 53; Palmer *v.* Cheney, 35 Iowa, 281; R. R. *v.* Reisner, 18 Kans. 458; Rountree *v.* Davidson, 59 Wis. 522; Dows *v.* Green, 16 Barb. 72; Williams *v.* Mitchell, 17 Mass. 98.

employed by his principal to do certain acts for him in the [★ 119] ★ course of that trade or business (*d*). This distinction, however, though it may be useful in considering the modes in which a general authority may be conferred, is of no use in an attempt to define the term.

Difficulty arising from apparent and express authority.]—The difficulties, then, which have arisen in considering the extent of an agent's authority, are, as has been already remarked, due in some degree to an incongruity existing between the apparent and the express authority of the agent. In considering the extent of his authority it is not enough, under all circumstances, to ask whether the authority is general or special. We must learn whether the question at issue concerns the relative rights of the principal and agent only, or the principal and third parties. In the former case the answer to that question would mark out the limits of that authority; not so in the latter case. In *Edmunds* v. *Bushell and Jones* (*e*), decided in 1865, the defendant J. carried on business in two different towns. In one, where he traded as B. and Co., he employed the defendant B. as his manager, and to carry it on in his own name. It was proved that the drawing and accepting bills of exchange was incidental to the carrying on of a business of the like kind. There was an agreement between B. and J. that B. should neither accept nor draw bills. Contrary to this agreement, B. accepted a bill in the name of "B. and Co." The bill was taken by a banking company for a valuable consideration. B. was shortly afterwards dismissed. It had been further stipulated between B. and J. that B. should receive as salary one-half of the net profit derived from the business carried on in his name. At the trial, before Mr. Justice Crompton, the jury gave a verdict for the plaintiff, leave being reserved to enter a verdict for the defendant, if the court should be of opinion that there was no reasonable evidence of the defendant J.'s liability. The rule was refused. In support of the motion an attempt was made to make the liability of J. depend upon whether B. had or had not been held out as a partner; but the Lord Chief Justice pointed out that the case was not one of nominal partners, but was a question of agency. "The case," said Cockburn, C. J., "falls within the well-established principle, [★ 120] that if a person employs another as an agent ★ in a character which involves a particular authority, he cannot, by a secret reservation, divest him of that authority. It is clear, therefore, that B. must be taken to have had authority to do whatever was necessary as incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and B. cannot be divested of the apparent authority as against third persons by a secret reservation." Mellor and Shee, JJ., concurred. "The case," said the former learned judge, "differs from those in which the question turns upon the fact whether A. or B. is a partner in

(*d*) Russel on Mercantile Agents, 62.

(*e*) L. R., 1 Q. B. 97.

the same firm. Here J. puts forward B. as principal, and it is in the name of B. and Co. that the business is carried on. It is not a question of partnership, but whether B., who has been held out to everybody as a partner, has authority to bind J. It would be very dangerous to hold that a person who allows an agent to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation." Here the character in which the agent was allowed to act involves the exercise of a larger authority than that which the principal had directly granted.

In *Smith* v. *M'Guire* (*f*), decided by the Court of Exchequer, in 1858, the principles applicable to this branch of law were very fully considered. This was an action upon a charter party. It appeared at the trial before Martin, B., that the defendant had formerly carried on business at Limerick as a corn merchant. He left that place for London, but gave his brother (the defendant M.) charge of the Limerick business, and allowed his name to remain over the door. During the following three years M. bought quantities of corn and chartered numerous ships on account of the defendant, who usually sent him special instructions upon each occasion. In 1858 M. chartered a ship to carry a cargo of oats to London, on her return from Quebec, signing the charter-party "per procuration." The present action was brought against the defendant for not loading a cargo pursuant to the charter-party, and the learned judge left it to the jury to say whether the defendant had allowed M. to act as his general agent. The full court upheld the ruling. The principle of all cases of the kind was well stated by the learned Chief Baron. "If a man by his conduct holds out another as his ★ agent, by permitting him to act in that character [★ 121] and deal with the world as a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound, though in a particular instance the agent may have exceeded his authority. It is even so in the case of a special agent; as, for instance, if a man sends his servant to market to sell goods, or a horse for a certain price, and the servant sells them for less, the master is bound by it." There was another question in this case which related to the effect of the expression "per procuration," in compelling third parties to learn the extent of the agent's authority.[1] "I think," said the same learned judge, "it makes no difference whatever whether the agent acts as if he were the principal, or professes to act as agent, as by signing 'A. B., agent for C. D.' The expression 'per procuration' does not always necessarily mean that the act is done under procuration. All that it in reality means is this, 'I am an agent not having any authority of

(*f*) 3 H. & N. 554.

[1] Equitable Life Insurance Co. *v.* Roe, 53 Md. 28; Rossiter *v.* Rossiter, 8 Wend. 498; Schimmelpennich *v.* Bayard, 1 Peters, 264.

my own.'" There can be no doubt upon principle of the correctness of this proposition. The *dicta* to the contrary in reported cases may be be explained by a reference to the facts of the particular case. There appears to be some inconsistency (*g*) between the *dicta* and the above view. Probably, however, the right explanation of the law is that adopted by the Court of Exchequer in the present case. If the mere use of the words "per proc." had at law the effect of putting third parties who dealt with him upon inquiry into his authority, it would be absurd to stop there. The principle would have to be carried to the full extent that the agent's instructions must be inquired into upon every fresh transaction. If strictly followed, the introduction of such a rule would have the effect of crippling commercial intercourse by checking the utility of the whole body of mercantile agents.

Secret limitations of agents authority.]—It proceeds as a corollary from what has been already said that wherever a special agent or a general agent with a secret limit to his powers has been placed by his principal in a position where his apparent exceeds his real authority, the principal is not entitled to be relieved against any contract entered into merely upon the ground that he had previously [★ 122] instructed his agent not to enter ★ into a contract except under certain circumstances (*h*), these circumstances being unknown to the other contracting party.[1]

Summary.]—The distinction between general and special agents serves, at least, as a basis for the distribution of all varieties of authority into two classes, each of which has definitely-marked points of contrast with respect to the liability of the principal when the authority has not been duly executed. Nevertheless it will be borne in mind that general agents and special agents may have their powers controlled, limited, or extended by the operation of certain rules which will be discussed hereafter.

The result of the cases is that—

(i.) Third parties dealing with an agent who has merely a special or particular authority must make themselves acquainted with the limits of that authority.

(ii.) If they neglect to do so, and the agent exceeds his authority, the principal will not be bound, unless he is estopped, by his conduct, from pleading the actual terms of the authority; unless, for instance, he has held out the agent as possessing a larger authority than was actually conferred.

(*g*) See *per* Holroyd and Littledale, JJ., in Attwood *v.* Munnings, 7 B. & C. 278.
(*h*) See Duke of Beaufort *v.* Neeld, 12 C. & F. 248, per Lord Campbell, 290.
(*i*) See Smith's Merc. Law, ch. v., sect. 4; Story on Agency, sect. 126, and cases cited.

[1] Adams Express Co. *v.* Schlessinger, 75 Pa. St. 246; Cosgrove *v.* Ogden, 49 N. Y. 255; Kinealy *v.* Burd, 9 Mo. Ap. 359; Golding *v.* Merchant, 43 Ala. 705; Insurance Co. *v.* Wilkinson, 13 Wall. 222; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354.

★CHAPTER II. [★ 123]

POWERS PRIMA FACIE INCIDENT TO EVERY AUTHORITY.

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SECT. 1.—*The necessary Means of executing the Authority with Effect.*

Classification of the questions relating to nature and extent of authority.]—To arrange the numerous questions which must be considered in an examination of the nature and extent of an agent's authority in a clear and methodical manner is a task of no small difficulty. Few, if any, divisions of the subject are quite free from the common fault of containing one or more cross divisions—to use the language of logicians. In the following ★ classification [★ 124] an attempt is made to simplify this branch of the law :—

(A) Powers *primâ facie* incident to every ascertained authority.
  (a) All the necessary and usual means of executing the authority with effect.
  (b) All the various means justified by the usages of trade.
  (c) Other powers contained in authorities of a particular kind.
(B) Of the construction of an agent's authority.
  (a) When the authority is given by a formal instrument.
  (b) When the authority is given by an informal instrument.
  (c) When the authority arises from implication.
  (d) When the instructions are ambiguous.
(C) Of the limits of an agent's authority.
  (1.) Of the extension of an agent's authority.
    (a) By parol evidence: 1. Of custom and usage; 2. In other cases.
    (b) By conduct of principal.
  (2.) Of the limitations of an authority.
    1. As between principal and third parties; 2. As between principal and agent.

Powers incident to every authority—Usual means of executing authority with effect.]—There are certain powers incident to every authority unless the principal has taken the precaution of forbidding their exercise. Amongst such powers are those which enable the agent to employ all the necessary and usual means of executing the principal authority with effect.[1] The reasonableness of the rule is beyond dispute. Its operation has no effect in weakening the salutary principle so much insisted upon in the law books to the effect that an authority must be strictly pursued; and this fact was fully recognized at an early period (*a*).

In *Dawson* v. *Lawley* (*b*), a decision of Lord Kenyon, in 1801, an attorney brought assumpsit for work done in preparing a release. The facts are shortly these: An arbitrator had made an award, re-

(*a*) See per Eyre, C. J., in Howard *v.* Baillie, 2 H. Bl. 618; Dennett *v.* Grover, Willes, 195; Ancaster *v.* Milling, 2 D. & Ry. 714.
(*b*) 4 Esp. 64.

[1] As where an agent empowered to contract for the sale of land, entered into an agreement, by which it was stipulated that the vendee should clear, make improvements, and pay purchase money by instalments and after all conditions performed to receive a deed in fee for premises. The receipt of the agent for instalments of the purchase money paid before execution of the deed bound the principal. Peck *v.* Harriott, 6 S. & R. (Pa.) 145. An agent employed to ship goods to the owner may make such a contract with the common carrier as in his discretion seems best. Shelton *v.* Merchants Dis. Trans. Co. 59. (N. Y.), 258; Nelson *v.* The H. R. R. R. 48 (N. Y.) 498. A general superintendent of an Express Company empowered to employ and discharge agents and direct their conduct, make contracts and exercise a general supervision over the business of the company, cannot license one of his co-employés to engage in and carry on a business in competition with, and injurious to that of the Express Company. Adams Express Co. *v.* Trego, 35 Md. 47; Merrick *v.* Wagner, 44 Ill. 266.

quiring the defendant to pay 5*l.*, and execute a release to the other party. The defendant employed the plaintiff to pay this money, and told him to "do the needful." The ★ plaintiff pre- [★125] pared a release pursuant to the award. In reply to an argument that the plaintiff's authority was a special authority to pay 5*l.*, Lord Kenyon observed that the defendant having given orders to the plaintiff to do what was needful, thereby authorized him to take such steps as were directed by the award, to which the payment of the money had relation. Here the authority to "do the needful" could not be carried out with effect, unless an authority to prepare a release in accordance with the award was implied.

Heinrich v. *Sutton* (*c*), decided by the Court of Appeal in 1871, was more complex. The property of a banking company was vested in trustees by a deed of settlement, which provided that the court of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, and to direct the necessary parties to such actions or suits to carry them on or defend them, and that such parties should be indemnified out of the funds of the bank. In a suit relating to certain property claimed by the bank, the plaintiff and two others were made co-defendants. They, as well as the plaintiff, were the trustees in whom the property of the bank was vested. The solicitors of the bank entered an appearance for the plaintiff in this action without his knowledge. He then applied to Malins, V.-C., to expunge the appearance as irregular, on the ground that the above provision did not interfere with the plaintiff's right to appear by his own solicitor. The application was refused. Upon appeal the Lords Justices upheld the Vice-Chancellor's decision, on the ground that the entry of this appearance was not wrong or improper, and that nothing was done by solicitors which they were not authorized in doing under the provisions of the deed of settlement.

Howard *v.* Baillie *examined.*]—Text-writers generally refer to *Howard* v. *Baillie* (*d*), which was decided in 1796, by the Court of Common Pleas, as a leading authority in support of the principle under discussion. That case is rather an authority upon a question of implied ratification. Its application to the question of implied authority is confined to what can, under the circumstances, be considered as no more than a *dictum* which was not necessary for the decision. The defendant, an executrix, ★ gave a letter of [★126] attorney to A. B., empowering him to transact the affairs of the testator in the name of the executrix, as executor, and to pay, discharge and satisfy all debts due from the testator. A. B. accepted a bill of exchange in the name of the executrix, so making her personally liable for the amount of a debt due from the testator. The drawer of the bill sued the defendant and obtained a verdict. An applica-

(*c*) L. R., 6 Ch. 220.
(*d*) 2 H. Bl. 610.

tion for a new trial was made on the ground that the agent was not duly authorized to accept the bill. The court were of opinion that the case might be disposed of by the application of the rule that every authority includes all the means necessary to be used in order to attain the accomplishment of the principal power. There was, however, in the opinion of the court, evidence of a special procuration. Whilst this case was pending in the Court of Common Pleas, a similar one was pending in the King's Bench, where Lord Kenyon presided (*e*). The decision in this case, that a power of attorney given by an executrix to act for her as executrix, does not authorize the accepting of bills of exchange to charge her in her own right, though for debts due from the testator, is inconsistent with the principles adopted by the Common Pleas in the former case. There can, however, be no doubt that both decisions are reconcilable. The former can be supported upon the ground of ratification, a ground which was not present in the latter case. On delivering judgment in *Gardner* v. *Baillie*, Lord Kenyon remarked that the judges of the Court of Common Pleas authorized him to say that they concurred in his construction of the letter of attorney; but that they thought there were other circumstances in the case which came before them. What other circumstances existed in the opinion of the Common Pleas is not easy to say. "We understand," said Chief Justice Eyre, "that it did not appear in the case (*Gardner* v. *Baillie*) that the acceptance was given for the payment of the debt due from the testator." But, in the report of that case, it is clearly stated that the bill was drawn and accepted for such a debt. The material point of difference between the cases appears to be that in one there was evidence of ratification, in the other there was not. This, it is apprehended, is the true distinction.

Observations on Howard *v.* Baillie.]—What is here said of the decision in *Howard* v. *Baillie* (*f*) does not affect the observations [★ 127] ★ of the court upon the extent of such an authority as that in question. "It must occur to every man, who reflects upon the nature of this trust, that numberless arrangements would have to be made by those who execute it, accounts to be settled, disputed claims to be adjusted, unjust ones to be resisted, actions to be instituted und defended, payments to be postponed or forestalled, according to the state of the fund, and, perhaps, if the estate should be insolvent, a distribution to be made among the creditors (*g*). All this may be granted; but there is no principle which enables us to deduce from an authority to bind another in his representative character, an authority to bind him personally.

Instances of the application of the principle.]—The principle is too well founded in reason to be questioned. The difficulty here, as in all cases where principles of law are well established, is to

(*e*) Gardner *v.* Baillie, 6 T. R. 591.
(*f*) *Supra.*
(*g*) Howard *v.* Baillie, 2 H. Bl. 610, 622.

show that particular cases come within its operation. For instance, where an agent employed by the indorsees of a bill to get it discounted warranted the bill to be a good one, his principals were bound by the act, and were held liable to refund if the bill were afterwards dishonoured by the acceptor (*h*). So, it is said, an authority to recover and receive a debt contains an authority to arrest the debtor (*i*); but not to demand a larger sum than the principal has agreed to receive in satisfaction (*k*). An authority to settle losses on a policy includes a power to refer to arbitration (*l*),[1] and an authority to effect a policy contains an authority to adjust a loss under the policy (*m*).[2]

Authority of municipal corporations to protect their property.]—These bodies are justified in using the borough funds for the purpose of opposing a bill in parliament whereby their existence, property, or privileges are imperilled (*n*).

★ SECT. 2.—*Means justified by the Usages of Trade.* [★ 128]

Illustration from the employment of brokers.]—The rule that an agent is empowered to use all the ordinary means justified by the usages of trade in executing his authority, was well established long anterior to the decision of the King's Bench in *Sutton* v. *Tatham* (*o*) in 1839. The defendant there had employed the plaintiffs, as brokers, to sell 250 shares in a company. On the day after receiving authority they sold 109 shares, and on the following day

(*h*) Fenn *v.* Harrison, 4 T. R. 177.
(*i*) *Per Curiam*, Howard *v.* Baillie, *supra.*
(*k*) Gretton *v.* Mees, 7 Ch. D. 490.
(*l*) Goodson *v.* Brooks, 4 Camp. 163.
(*m*) Richardson *v.* Anderson, 1 Camp. 43, n.
(*n*) Attorney-General *v.* Mayor of Brecon, 10 Ch. Div. 204; 48 L. J., Ch. 52. See also Reg. *v.* Mayor of Sheffield, L. R., 6 Q. B. 652; Attorney-General *v.* Wigan, Kay, 268; and Bright *v.* North, 2 Phill. 260; 5 De G., M. & G. 52, upon this and similar questions.
(*o*) 10 Ad. & E. 27.

[1] In Huber *v.* Zimmerman, 21 Ala. 488, it was held that an authority "to settle" does not authorize the agent to submit to arbitration the matter in dispute. This, however, was not to settle losses on a policy of insurance, but differences between parties on their mutual accounts.

[2] Little *v.* Phœnix Insurance Co., 123 Mass. 380.

[3] A merchandise broker having in his possession goods belonging to his principal with power to sell, deliver, and receive payment, may deposit them in the usual course of business with a commission merchant, who advances his notes thereon, and such action on the part of the broker will bind the principal; Laussat *v.* Lippincott, 6 S. & R. (Pa.) 386.

A clerk in a mercantile house may sign his principal's name to shipping bills, if he occupies such a position in the business of his employers which usually entitles the incumbent to sign such bills. It is not necessary to prove express authority. Downs *v.* Greene, 16 Barb. (N. Y.) 72; Bank *v.* Bank, 10 Wallace, 604.

100 more. On the latter day, but after the sale, the defendant told the plaintiffs that he had made a mistake and intended to sell only fifty shares, and was informed that the sales could not be made void. The defendant left the matter in the hands of the plaintiffs to do the best they could. By the rules and usages of the Stock Exchange, if upon a sale of this description the vendor was not prepared to complete his contract, the purchaser may buy the requisite number of shares, and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The purchaser having bought at a loss, the broker paid the difference, and then sued in assumpsit for money paid. At the trial, Lord Denman thought that the principal was liable, but he left it to the jury to say whether the bargain for the loss on the second purchase was made within a reasonable time after the mistake was discovered. The jury found for the plaintiff. A motion for a new trial, on the ground of misdirection, was refused by the full court. The defendant relied chiefly upon the case of *Child* v. *Morley* (*o*). But it is clear, from the remarks of Lord Kenyon, that the broker had a cause of action, though there were doubts, as to the form in which it should be tried. His lordship, having made some severe remarks upon the nature of the defence set up, concluded:—"But I cannot perceive what benefit the defendant can propose to himself by such conduct; for the court have no doubt but that, at all events, the verdict must stand for the 12*l.* 10*s.*, the amount of the plaintiff's commission as broker; but as to the rest of the claim there is a difficulty in the form of action, and, perhaps, it would have been better framed *ex delicto* than *ex contractu*." In *Sutton* v. *Tatham* (*p*), Littledale, J., laid down the rule in general terms:—"A [★ 129] person who employs ★ a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." The former decision does not appear to have been at all discussed by the learned judges. Taking it in its widest extent, it is only an authority limiting the scope of the action of assumpsit.

Usages and rules of Stock Exchange.]—The law is now well settled that when a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or their sellers, of jobbers, members of the Stock Exchange, the lawful usages and rules of the Stock Exchange are incorporated into and become part and parcel of all such contracts, and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages (*q*).[1]

(*o*) 8 T. R. 610.

(*p*) *Supra;* see Robinson *v.* Mollett, L. R., 7 H. L. 802.

(*q*) *Per* Kelly, C. B., in Bowring *v.* Shepherd, L. R., 6 Q. B. 309; Grissell *v.*

[1] Cameron *v.* Durkheim, 55 N. Y. 425.

In *Taylor* v. *Stray* (*r*), Willes, J., traces the rule applicable to such cases to the rule which pervades the whole law of principal and agent, namely, that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him. The court decided that the defendant, by directing the plaintiffs to purchase shares, necessarily gave them authority to pay for them according to the rules of the Stock Exchange.

Smith v. *Lindo* (*s*), decided in 1858, presents some new features. The plaintiff, though he was not duly licensed, assumed to act as broker (in London) in the purchase of shares for the defendant, and had been obliged to pay to the seller the price of the shares by the usage of the share market. There was nothing to show that the payment was made in pursuance of any illegal contract, nor was it a necessary part of the duty of a broker as such to pay the money. The plaintiff brought an action for the amount paid by him on behalf of the principal, and for commission. At the trial a verdict was found for the plaintiff, and the Court of Common Pleas afterwards held that, although the plaintiff was, by the 6 Anne, c. 16, rendered ★ incapable of suing for commission by reason [★ 130] of his not being duly licensed as a broker, yet that he might recover from his principal the price which, pursuant to a usage of the share market, he had been obliged to pay to the person from whom he purchased, the statute of Anne not making the contract void, but merely precluding the unlicensed broker from recovering any remuneration for his services in making it. The defendant's appeal from this decision was heard in the Exchequer Chamber before Wightman, Erle, Crompton, and Hill, JJ., and Martin, Bramwell, and Watson, BB. The decision of the Court below was upheld. Crompton, J., alone dissented, on the ground that the payment of the commission and the repayment of the money paid, both stood on the same footing. The view of the majority is supported by the decision of the Court of Exchequer in *Pidgeon* v. *Burslem* (*t*).

Payment of wagers by agents—8 & 9 *Vict. c.* 109.]—With the above decisions may be compared the more recent case of *Rosewarne* v. *Billing* (*u*). The plaintiff sued the defendant for money alleged to be paid for the defendant at his request. To this the defendant pleaded that the money became due by reason of certain wagering contracts made by the plaintiff for the defendant with certain other persons since the passing of the 8 & 9 Vict. c. 109. The plaintiff demurred. Judgment was given for the plaintiff. "Now," said Chief Justice Erle, "the law as to gaming contracts is that all such

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Bristowe, L. R., 4 C. P. 36; Coles *v.* Bristowe, L. R., 4 Ch. 3, and see cases cited at pp. 425, 533, *infra*.

(*r*) 2 C. B., N. S. 175.

(*s*) 5 C. B., N. S. 587.

(*t*) 3 Ex. 465.

(*u*) 15 C. B., N. S. 316; 33 L. J., C. P. 55.

contracts are null and void, and no action can be maintained upon them. But they are not therefore illegal. The parties making them are not liable to any action or to any penalties . . . . . I am clearly of opinion that if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid." This is consistent with *Jessopp* v. *Sutwyche* (*u*), and *Knight* v. *Chambers* (*v*). The effect of these cases, and others of the like kind, is that an agent's authority to act for his principal may be implied in any case where there is no illegality proved.

Authority of agent to pay bets]—*Rosewarne* v. *Billing* (*x*) was discussed by Hawkins, J., in a case which is an authority for [★ 131] ★ the proposition that the employment of an agent to make a bet in his own name on behalf of his principal implies an authority to pay the bet if it is lost, and on the making of the bet that authority becomes irrevocable (*y*). This was decided in 1882 by Hawkins, J. "I am not aware," said his Lordship, "that this point has been judicially decided, though it was shortly mooted in *Rosewarne* v. *Billing* (*z*). . . . . As a general rule, a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest, it is, in contemplation of law, irrevocable. . . . . In the present case the authority to pay the bets, if lost, was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred, on the faith of that authority, to pay the debts if lost; the consideration for that authority was the taking upon himself that responsibility at the defendant's request. . . . . If a principal employs an agent to do a legal act (*e.g.*, to make a wager or debt which is only a null and void debt), the doing of which may, in the ordinary course of things, put the agent under an absolute or contingent obligation to another, and, at the same time, gives him an authority, if the obligation is incurred, to discharge it at the principal's expense, the moment the agent, on the faith of that authority, does the act, and so incurs the liability, the authority ceases to be revocable" (*a*).

Payments made by reason of agent's default.]—Although the authority of an agent *primâ facie* includes an authority to act in accordance with established and reasonable usage, yet such authority will not be extended to cases where the agent is compelled to make a payment in the course of his agency by reason of a default of his

(*u*) 10 Ex. 614.

(*v*) 15 C. B. 562; and see Beeston *v.* Beeston, L. R., 1 Ex. Div. 13.

(*x*) *Supra.*

(*y*) Read *v.* Anderson, 10 Q. B. Div. 100. See Oldham *v.* Ramsden, 44 L. J., C. P. 309; *Ex parte* Pyke, 8 Ch. Div. 754; Bubb *v.* Yelverton, L. R., 9 Eq. 471.

(*z*) 15 C. B., N. S. 316; 33 L. J., C. P. 55.

(*a*) Hampden *v.* Walsh, 1 Q. B. D. 189, and Diggle *v.* Higgs, were distinguished on the ground that the authority of the stakeholders was not coupled with an interest.

own. In *Duncan* v. *Hill* (*b*), finally decided in 1873, the defendant (who was not a member of the Stock Exchange) instructed the plaintiffs (brokers on the Stock Exchange) to buy certain shares for him for the account of July 15th, 1870. On that day, acting upon his instructions, ★ the plaintiffs carried the shares [★ 132] over to the account of July 29, and paid differences amounting to 1,688*l.* The plaintiffs subsequently became defaulters, and on the 18th were declared defaulters, and their transactions were closed in conformity with the rules of the Stock Exchange. The accounts were made up at the prices current on the 18th without the knowledge of or any reference to the defendant. The result was that the sum due, including the 1,688*l.*, upon the whole transaction was 6,013*l.* 13*s.* 5*d.* For the plaintiffs it was argued that a defaulting broker has no right to avail himself of a usage regulating the mode of dealing with defaulters in order to fix his principal with an additional liability. The court below, accepting the principle that the whole of the usages and practice of the Stock Exchange were imported into the contract, thought that the plaintiffs had authority to bind the defendant, that the defendant being the real purchaser was so identified with the plaintiffs, his agents, as to be liable to the performance of the contract made in all its incidents, and with all its consequences, and that he was accordingly liable for any result due to the operation of those rules of the Stock Exchange which operated only in cases of default by the agent. This decision is open to the serious objection that it makes a plaintiff liable to the agent for losses which are directly due not to the execution of the agency, but to a default on the part of the agent. The Court of Exchequer Chamber, consisting of Blackburn, Keating, Grove, Brett, Quain, Archibald, and Honyman, JJ., unanimously reversed the judgment of the court below upon that ground alone. The result is, that a principal is bound to indemnify his agent for losses incurred by the latter by the operation of an acknowledged usage or custom, unless the usage is unreasonable, or unless the loss is incurred by a default of the agent himself, as in this case, by reason of his insolvency. "It is argued," said Blackburn, J., in delivering the judgment of the court, "that where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify ★ him. . . . These allega- [★ 133] tions, both as to fact and law, seem to us to be correct."

Appointment of sub-agents.]—An authority to appoint a sub-

(*b*) L. R., 6 Ex. 255; L. R., 8 Ex. 242.

agent or substitute, between whom and the principal a privity will exist, may be implied where, from the conduct of the parties, to the original of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute (*d*).[1] Hence, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time, in the course of its employment under charter, happen to be, is one in which the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and the authority to appoint such substitutes is implied (*e*). But where such a sub-agent is appointed by the agent, the latter has no implied authority to change the sub-agent's position from that of an agent to that of a purchaser from the principal (*f*).

Authority to accept tender.]—Where there is a place of business, *e. g.*, a shop, a merchant's office, or a solicitor's office, and a person is conducting or in charge of that business, such person has implied authority to accept or refuse a tender unless he disclaims such authority (*g*). This seems to be the result of the authorities. In *Finch* v. *Boning* the learned judges were at variance as to what amounts to a disclaimer. Coleridge, C. J., thought that if such person showed he had "no instructions" that was no disclaimer, as it was consistent with his having authority. Denman, J., was of a contrary opinion, on the ground that those words had the same effect as the words, "I have no authority," used in *Bingham* v. *Allport* (*h*).

Right of shareholder to sell his shares.]—A shareholder in a joint stock company has implied authority to dispose of his [★ 134] ★ property therein (*i*), and the directors have no power to refuse a transfer (*k*). This right may, of course, be limited by any contract which the shareholder has entered into in diminution or derogation thereof.

Authority of agent for sale.]—When an agent is commissioned by a vendor to find a purchaser, he has authority to describe the

(*d*) *Per Curiam*, De Bussche *v.* Alt, 8 Ch. D. 310.
(*e*) *Ibid.* (*f*) *Ibid.*
(*g*) See Finch *v.* Boning, 4 C.-P. Div. 143, and cases cited.
(*h*) 1 Nev. & Mac. 398; and see Wilmott *v.* Smith, 1 M. & W. 238; Barrett *v.* Deere, *ib.* 200; Moffatt *v.* Parsons, 5 Taunt. 307; Kirton *v.* Braithwaite, 1 M. & W. 310; *Anon.*, 1 Esp. 350; Watson *v.* Hetherington, 1 C. & P. 36.
(*i*) Poole *v.* Middleton, 29 Beav. 646, p. 650.
(*k*) Moffatt *v.* Farquhar, 7 Ch. Div. 591.

[1] An agent having power to employ another agent, has also authority to settle the amount of wages and other terms of the contract, unless he is restricted in the exercise of such power. Ala. Great South R. R. *v.* Hill, 76 Ala. 303; see Williams *v.* Getty, 31 Pa. St. 460.

property, and to state any fact or circumstance which may affect the value so as to bind the vendor.[1] If an agent so commissioned makes a false statement as to the description or value, though without authority, which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance (*l*). An authority to let a house contains an authority to describe the property truly, to represent its actual situation, and to represent its value. An authority to find a purchaser implies the same incidents (*m*).

Authority to receive money.]—An authority to an agent to receive money implies that he is to receive it in cash.[2] If the agent receives the money in cash the probability is that he will hand it over to his principal, but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor he might not not be able to pay it over.[3] It would very much diminish the chance of the principal ever receiving it (*n*). An insurance broker is only entitled to received payment for the assured in money, and a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal (*o*).[4] To the same effect Lord Tenterden says (*p*):—"An authority given by a principal to his agent to receive money cannot be construed into an agreement not to receive money but to allow the debtor to write off so much as may be due from the agent to him." In the same case (*q*) Bayley, J., puts the principle in other

(*l*) Mullens *v.* Miller, 22 Ch. Div. 194. (*m*) See per Bacon, V.-C., *ib.*, p. 199.
(*n*) Per Byles, J., in Sweeting *v.* Pearce, 7 C. B., N. S. 449; affirmed 9 C. B., N. S. 534. See, too, Scott *v.* Irving, 1 B. & Ad. 605, 614; *Re* Cooke, 4 Ch. Div. 123; and Tomkins *v.* Saffery, 3 App. Ca. 213.
(*o*) Todd *v.* Reid, 4 B. & Ald. 210.
(*p*) In Bartlett *v.* Pentland, 10 B. & C. 760, p. 769; *infra*, p. 139.
(*q*) Page 771.

[1] And also to receive so much of the purchase money as is to be paid in hand. Yerby *v.* Grisby, 9 Leigh. (Va.) 387. When such money is to be paid to the agent for the purpose of securing the execution of the contract, if the purchaser refuses to pay, he cannot enforce the contract. Goodale *v.* Wheeler, 11 N. H. 424.

[2] He cannot receive it by a check on a bank, in which the drawer has no funds. Broughton *v.* Sillway, 114 Mass. 71. Where he has authority to sell goods he cannot exchange them in barter. Taylor *v.* Starkey, 59 N. H. 142. A power of attorney to sell land does not authorize the agent to mortgage it. Jeffrey *v.* Hursh, 49 Mich. 31; Switzer *v.* Wilvers, 24 Kan. 384. An agent cannot receive rent in cash and merchandise, the payment in cash is good but that in merchandise is not. Rhine *v.* Black, 59 Texas, 240. Unless a usage of trade to the contrary, a power of sale does not carry with it the right to sell on credit. Burks *v.* Hulebard, 69 Ala. 379.

[3] An agent cannot compound with his principal's debtors and receive payment by cancelling his own debt. Belton Compress Co. *v.* Belton Brick Manfg. Co., 64 Tex. 337.

[4] In Chickering *v.* Globe Insurance Co., 116 Mass. 321, the plaintiff was allowed to recover under such circumstances. Where the agent who is indebted to the insured for rent, credits him for that amount, it is a valid payment of the premium. Woody *v.* Old Dominion Insurance Co., 31 Gratt. (Va.) 362.

words:—"If instead of making the payment [to the order of the principal], they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money, then as [★ 135] the ★ broker was not authorized to receive payment in that way, it was done at the peril of the underwriters."

Authority of agent to warrant a horse.]—This of course depends upon the circumstances of each case. If a servant is entrusted to sell at a fair to a stranger such authority may be implied (*r*). In general a servant has no implied authority to warrant (*s*),[1] but the servant or agent of a horse dealer has such authority (*t*).[2]

Authority of holder of bill of lading.]—An agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel has implied authority to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo (*u*).

Authority to receive money—Set-off—Cheque.]—Where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money.[3] If, however, payment is made by cheque, and the cheque is duly honoured, that is a payment in cash. There is nothing in the circumstances of a cheque being given which invalidates the payment.[4] In *Bridges* v. *Garrett* (*v*), the defendant gave to an agent a cheque for an amount owing to the principal. At the request of the agent, the defendant crossed the cheque with the name of the agent's bank. The latter paid it into his own private account on the same day. The defendant's bankers duly paid the cheque to the agent's bankers, who refused to pay any part of the proceeds of the cheque, but applied them in satisfaction of the agent's overdrawn account. The Court of Exchequer Chamber held that, assuming the agent to be duly authorized, the payment to him was a payment to the plaintiff, and that there was nothing

(*r*) Brooks *v.* Hassall, 49 L. T. 569.
(*s*) Brady *v.* Todd, 9 C. B., N. S. 592.
(*t*) Howard *v.* Sheward, L. R., 2 C. P. 148; Baldry *v.* Bates, 52 L. T. 620.
(*u*) Hingston *v.* Wendt, L. R., 1 Q. B. Div. 367.
(*v*) L. R., 5 C. P. 451.

[1] And in case the principal receives the proceeds of a sale, in ignorance of an unauthorized warranty by the agent, it will not amount to a ratification of such unauthorized act. Smith *v.* Tracy, 36 N. Y. 79.

[2] Bradford *v.* Bush, 10 Ala. 387. An agent to sell a slave could make a warranty of title and soundness. Cooke *v.* Campbell, 13 Ala. 286; Ezell *v.* Franklin, 2 Sneed. (Tenn.) 236.

[3] Belton Compress Co. *v.* Belton Brick Mfg. Co., 64 Tex. 337.

[4] Broughton *v.* Sillway, 114 Mass. 71, which was a case in which there were no funds of the drawer's in the bank. Held, that the receipt of the check by the agent was not a payment. Where the express instruction is to sell for cash, and which means that the money shall be paid down when the title to the property passes, receiving a bank check, payable the next day after the sale, is not a sale for cash. Hall *v.* Storrs, 7 Wis. 253. An agent has no right to accept the payment of a debt due his principal and then substitute himself for the debtor. Aultman *v.* Lee, 43 Iowa, 404.

in the mode of payment which rendered the application of any other rule necessary. An authority to receive payment by an acceptance of a bill drawn in blank does not authorize the agent to draw a bill payable to his own order (*x*).

Payment by cheque to agent]—*Bridges* v. *Garrett* (*y*) was discussed by Fry, J., in 1878 in *Pearson* v. *Scott* (*z*), who ★ ap- [★136] proved of that decision on the ground that the payment by cheque, being made in the ordinary course of business, was good; the law being that a person who owes money to an agent knowing him to be an agent, must pay in such a manner as to facilitate the agent in transmitting the money so paid to him to the principal, and that he cannot pay that agent by a settlement of account in which he (the payer) gets the benefit.

As between agent and sub-agent.]—Although an agent authorized to receive money for a disclosed principal can only validly receive it in cash, and disengaged from any other relations between payer and payee, an agent for sale, authorized to employ in his own name a broker or other sub-agent in effecting the sale, may be satisfied by set-off or in any other manner in which a debt may be discharged as between the agent and sub-agent (*x*).

Authority to negotiate bill.]—An authority to negotiate a bill of exchange or promissory note implies an authority to sell or discount it, but not generally to pledge it (*y*).[1] To determine what authority is conferred by such words as "negotiate" and "dispose of," the words must be looked at in connection with the context (*z*).

Authority to libel.]—This will not be implied (*a*).

SECT. 3.—*Powers contained in Authorities of a Particular Kind.*

The agent must observe the terms of his authority.[2]]—The rule

(*x*) Hogarth *v.* Wherely, 32 L. T. 800; L. R., 10 C. P. 630; 44 L. J., C. P. 330.
(*y*) L. R., 5 C. P. 451.
(*z*) 9 Ch. Div. 198.
(*x*) Kaltenbach *v.* Lewis, 24 Ch. D. 54; 51 L. J., Ch. 881; 48 L. T. 844.
(*y*) Joamenjoy Coondoo *v.* Watson, 9 App. Ca. 561.
(*z*) *Ibid.*
(*a*) Harding *v.* Greening, 1 Moo. 477; Reg. *v.* Cooper, 8 Q. B. 536.

[1] A power to discount bills of exchange carries with it the power to endorse. Merchant's Bank *v.* Central Bank, 1 Ga. (Kelly) 418. Where A. is entrusted with B.'s note and authorized to negotiate it and use it for his own benefit, in the absence of express directions on the part of B. he may make such a contract with a bank concerning it as he sees fit. Bank *v.* Sinclair, 60 N. H. 100.

[2] The directions of the principal constitute a part of the agent's authority, and operate as a limit upon it. Any deviation or departure from them is at the peril of the agent and makes him liable for any loss occurring to the principal, by reason thereof. Johnson *v.* N. Y. Central R. R., 31 Barb. (N. Y.) 196. The fact that he used reasonable diligence will not decrease his liability. Butts *v.* Phelps, 79 Mo. 302. See, also, Wilts *v.* Morrell, 66 Barb. 511; Adams *v.* Robinson, 65 Ala. 586; Persch *v.* Sniggle, 57 Pa. St. 247; Godman *v.* Meixsel, 53 Ind. 11; Thornton *v.* Boyden, 31 Ill. 200; Clark *v.* Roberts, 26 Mich. 506.

laid down in the old law books is, that if a man act differently from his authority, the act is void, as if his authority is to do any act upon condition, and he does it absolutely (*b*), Thus it was said that an authority to do an act in a particular way implied that the agent should do it in no other, if any consequence might ensue from doing it in one way which might not ensue from doing it in the other (*c*). This rule, however, as will be seen hereafter, must be taken subject to what is said with reference to the extent and limits of the authority. But an authority to settle losses on a policy authorizes a reference of the matter to arbitration (*d*); and an [★ 137] authority to effect a policy ★ empowers the agent to adjust a loss under the policy, and consequently to use all means necessary to procure an adjustment (*e*). So, too, an authority to discount a bill or note implies an authority to indorse it in the name of the principal (*f*). And a bailiff who acts under a warrant of distress for arrears of rent has an implied authority to receive the amount of the rent and costs if tendered by the tenant; nor can such authority be limited by a previous express instruction given on behalf of the landlord to the bailiff not to receive the rent, but to refer the tenant to the landlord's attorney (*g*). So where an annuity deed contained a stipulation that it might be redeemed on payment of a certain sum and all arrears, on giving six months' notice to the grantee in writing, it was held by the Court of Common Pleas that an agent of the grantee, having a general authority to waive and invest money for the grantee, had authority to waive the stipulation and accept the redemption money (the deed being delivered up to him), though without the knowledge of the grantee (*h*).

An authority to invite tenders and obtain plans for a building is not an authority to pledge one's credit for the expense of such building when erected (*i*). A gatekeeper has no authority to undertake to make deliveries (*k*). A maltster's foreman has authority to take acceptance of barley, so as to satisfy sect. 17 of the Statute of Frauds (*l*).

Pawnee of goods has no right to deal with them.]—In the absence of express contract, the pawnee of property cannot sell it until the the debt for which it is pledged becomes payable; if he does sell,

(*b*) Co. Litt. 258a.
(*c*) 2 P. Wms. 19; Com. Dig. "Attorney," C. 13.
(*d*) Goodson *v.* Brooke, 4 Camp. 163.
(*e*) Richardson *v.* Anderson, 1 Camp. 43, n.
(*f*) Fenn *v.* Harrison, 4 T. R. 177.
(*g*) Haich *v.* Hale, 15 Q. B. 10; 19 L. J., Q. B. 289.
(*h*) Webber *v.* Granville, 30 L. J., C. P. 62.
(*i*) Whillier *v.* Roberts, 28 L. T. 668.
(*k*) Gosling *v.* Agricultural Hall Co., 35 L. T. 92.
(*l*) Kibble *v.* Gough, 38 L. T. 204.

the owner has a right to charge the pawnee with the price for which the property sold.[1]

A. and B., stockbrokers, borrowed on behalf of the plaintiff a sum of money for a term of three months from the defendants, who were also stockbrokers, upon the security of certain railway stock which was transferred by the plaintiff into the name of one of the defendant's firm. At the expiration of the term the loan was repaid with interest, and the defendants, who, pending the loan, had sold the plaintiff's stock, purchased other stock, and re-transferred a similar amount to the plaintiff. The plaintiff ★ claimed [★ 138] to be entitled to the amount of profit which the defendants had realized on the sale. Vice-Chancellor Malins held that the defendants were not justified, either by law or by the custom of the Stock Exchange, in parting with the security during the continuance of the loan, but were bound to return the identical stock pledged; and that the plaintiff was entitled to recover from the defendants the amount of profit realized by their dealings with the stock (*n*).

Authority to warrant.]—With respect to an agent's implied authority to warrant, the rule stated by Mr. Benjamin (*o*) is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual (*p*). This is merely an application of the general rules already dwelt upon, to the effect that an agent has *primâ facie* an implied authority to do all things which are necessary to the due execution of the authority or which are justified by usage.

Authority implied from conduct.]—Authority may, of course, be inferred from conduct.[2] A broker who acted for the plaintiff made a contract for the sale of goods to the defendant. He sent a note to each party, but signed only that which was sent to the seller. The contract was entered in his book and duly signed. The defendant kept the note which was sent to him, and made no objection until called upon to accept the goods. The court held

(*n*) Langton *v.* Waite, L. R., 6 Eq. 165.
(*o*) Sale of Personal Property, p. 508.
(*p*) Bayliffe *v.* Butterworth, 1 Ex. 425; Graves *v.* Legg, 2 H. & N. 210; 26 L. J., Ex. 316; Pickering *v.* Busk, 15 East, 38.

[1] The title to the property remains in the pawnor. The pawnee has merely the right to possession. The non-payment of the debt, even after it is due does not work a forfeiture of the pledge. The title remains in the pawnor until it is legally divested, either by a foreclosure in equity or by a sale on due notice. Before such notice the pawnee has no right to sell, and if he does so, he is liable to the pawnor for the value of the pledge. Edwards on Bailment, § 245.

[2] Where the owner of a vessel, on being informed by a broker at his place of residence that he has procured such vessel to be chartered at certain rates in a distant city, did not disaffirm the contract either to such broker, or charterer, the jury may find a ratification. Saveland *v.* Green, 40 Wis. 431; Brigham *v.* Peters, 1 Gray (Mass.), 139; Darnell *v.* Griffin, 46 Ala. 520; Forsyth *v.* Day, 46 Me. 176.

that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him (*q*).

Breach of duty—no implied authority to commit.]—An authority to commit a breach of duty will not be implied; for instance, an agent has no implied authority to assign to others the exercise of a discretion. Accordingly, a provision in the deed of settlement of a joint-stock company, authorizing the directors to borrow on the security of the funds or property of the company, and to cause the funds or property, or property on the security of which any sums should be borrowed, to be assigned by way or mortgage, does not authorize the directors to mortgage future calls, which were, [★ 139] by the deed of settlement, to be made when it ★ appeared necessary or expedient to the directors (*r*). "The directors," said Lord Justice Turner, "are bound, before they make a call, to exercise their discretion upon the question whether the call should or should not be made; and how can it be possible that they can assign calls, which are to be made by them in the exercise of their discretion, as part of the property or funds of the company? The consequence would be that the discretion which they are bound to exercise would be wholly defeated and put an end to." "My opinion is," said Lord Justice Knight Bruce, "that to construe the deed of settlement as warranting such an assignment as that, would be to authorize a plain breach of trust, and authorize an act inconsistent with the continuance of the society, and inconsistent probably with the lawful exercise of the powers of the directors." The principle upon which this and similar cases were decided is, that calls should be made at the discretion of the directors, and an assignment of future calls prevented the exercise of such a discretion (*s*).

Authority to receive acceptance of proposal]—Where the proposer of a contract is represented by an agent, the communication of the acceptance to him completes the contract, although the agent may neglect to inform his principal of the acceptance (*t*).

Authority to sell stock at named price.]—An authority to sell and transfer stock, "when the funds should be at 85 per cent., or above that price," does not allow the agent to defer selling till the funds should reach a higher price than 85, but the agent is bound to sell when the funds reach 85. Hence, when a mercantile house had accepted such a commission, and had not sold when the funds reached 85, it was held that the firm had made the stock their own from that time (*u*).

Authority of estate or house agent.]—Vice-Chancellor Hall

(*q*) Thomson *v.* Gardiner, L. R., 1 C. P. Div. 777.
(*r*) *Ex parte* Stanley, *Re* British, &c. Society, 33 L. J., Ch. 535.
(*s*) *In re* Sankey Brook Coal Co., L. R., 9 Ex. 721; see per Field, J., Hughes *v.* Trew, 36 L. T., N. S. 585.
(*t*) Wright *v.* Bigg, 15 Beav. 592.
(*u*) Bertram *v.* Godfray, 1 Knapp, P. C. C. 381.

recently dealt, in *Hamer* v. *Sharp* (*x*), with the question of the authority of an estate or house agent to enter into a contract for the sale of property. The actual question raised was whether, when an owner of an estate puts it into the hands of an agent for sale, stating a price for, and giving particulars of, the property, to enable him to inform intending purchasers, ★ but giving no in- [★ 140] structions as to the absolute disposal, and none as to the title of the property, and mentioning none of the special stipulations—which it might be proper to insert in conditions in reference to the title—the agent is authorized to sign a contract for the sale of the property for the price stated in the instructions, without making any provisions as to title. His lordship decided the question in the negative, and expressed an opinion that when instructions are given to an agent to find a purchaser of landed property, but no instructions as to the conditions to be inserted in the contract as to title, he is not authorized to sign a contract on the part of the vendor.

Agents for sale or purchase.]—An agent employed to purchase has no authority to buy his own goods;[1] nor, on the other hand, may an agent employed to sell purchase his principal's goods for himself.[2] A principal may either repudiate such transactions altogether, or he may adopt and take the benefit of them (*y*). Again, an authority to sell for money does not authorize an agent to barter (*z*), or to sell (*a*). Nor does an authority to obtain orders for goods authorize an agent to receive payment for them; nor does an authority to sell at a particular place authorize their sale elsewhere (*b*); nor, again, does an authority to sell stock authorize an agent to sell on credit (*c*); nor, if the authority is to sell and transfer for the principal, will it authorize a transfer by way of security for the agent's private debt (*d*). An authority to buy for ready money is no authority to buy on credit (*e*), nor is an authority to receive a payment in money an authority to receive a bill instead (*f*),

(*x*) L. R., 19 Eq. 108.
(*y*) Bentley *v.* Craven, 18 Beav. 75.
(*z*) Guerreiro *v.* Peile, 3 B. & Ald. 616.
(*a*) City Bank *v.* Barrow, 5 App. Cas. 664.
(*b*) Catlin *v.* Bell, 4 Camp. 183.
(*c*) Wiltshire *v.* Sims, 1 Camp. 258.
(*d*) De Bouchout *v.* Goldsmid, 5 Ves. 211.
(*e*) Show. 95; Stubbings *v.* Heintz, 1 Peake, N. P. 66.
(*f*) Thorold *v.* Smith, 11 Mod. p. 2; Ld. Raym. 930.

[1] Even though he charges no more than the market price; Tewksbury *v.* Spruance, 75 Ill. 187; Tausig *v.* Hart, 58 N. Y. 425; Ely *v.* Hare, 65 Ill. 267. An agent who has been instructed to insure, cannot take the risk upon himself as insurer. In case of loss he would be bound to indemnify his principal not as an insurer but on the ground of having failed to comply with his instructions; 12 La. An. 20.

[2] Keighler *v.* Manf'g Co., 12 Md. 383; Copeland *v.* Insurance Co., 6 Pick. (Mass.) 198; Coal Co. *v.* Sherman, 30 Barb. (N. Y.) 553; Parker *v.* Vose, 45 Me. 54; Ames *v.* The Port Huron Co., 11 Mich. 139.

or to demand a larger sum (*g*), nor is an authority to act as scrivener an authority to agree to a composition (*h*), but a duly appointed counsel may bind a client by consent (*i*). In this case Lord Eldon observed that it was for counsel to consider whether he was authorized to consent, and not for the court; so, too, an attorney has an implied authority to enter into a compromise on his client's behalf (*k*), [★ 141] and if the plaintiff in an action continues the ★authority of his attorney after judgment, the attorney retains the power to bind his client by a compromise (*l*).[1]

Sale of goods in agent's name.]—With respect to the evidence of an agent's authority to sell goods in his own name, it has been decided that the fact that a principal has intrusted an agent with the possession of goods for the purpose of selling them is, as between the agent and third parties buying the goods, *primâ facie* evidence that the agent is authorized to sell them in his own name. Hence, if the court is satisfied that no limitation of the agent's authority was disclosed to the buyer, a set-off of a debt due from the agent is a good defence to a claim by the principal against the buyer, notwithstanding that the agent, though so intrusted with the goods, was under an agreement with his principal not to sell in his own name (*m*).[2]

Authority of agent to sign memorandum of association.]—A man's name may be subscribed to the memorandum of association of a company by his agent, and it is not necessary that the agent should be authorized to sign his principal's name by deed under seal (*n*).

Common informers.]—A common informer has no implied authority to maintain an action for a penalty created by statute (*o*).

Churchwardens.]—Churchwardens of a church with free seats have authority to direct, for the maintenance of order, in which of

(*g*) Gretton *v.* Mees, 7 Ch. Div. 839.
(*h*) 2 Vern. 127.
(*i*) Mole *v.* Smith, 1 Jac. & W. 673.
(*k*) Chown *v.* Parrott, 14 C. B., N. S. 74; Lush, Pr. 256; Prestwick *v.* Poley, 18 C. B., N. S. 806.
(*l*) Butler *v.* Knight. L. R., 2 Ex. 109.
(*m*) *Ex parte* Dixon, *Re* Henley, L. R., 4 Ch. Div. 133; 46 L. J., Bank. 20; 35 L. T. Rep., N. S. 644.
(*n*) *In re* Whitley, *Ex parte* Callan, 32 Ch. Div. 337; 55 L. J., Ch. 540; 54 L. T. 912.
(*o*) Bradlaugh *v.* Clarke, L. R., 8 App. Cas. 354.

[1] An attorney-at-law conducting an action of ejectment cannot compromise it without the consent of his client; Mackey's Heirs *v.* Adair, 99 Pa. St. 143.
But an attorney-at-law may, without express authority, from his client, in an action of ejectment, bind him by an agreement to submit all matters in dispute to arbitrators, whose decision shall be final, without right to writ of error. Sargeant *v.* Clark, 108 Pa. St. 588.

[2] Thomas *v.* Atkinson, 38 Ind. 248; Barker *v.* Garvey, 83 Ill. 184; Richardson *v.* Farmer, 36 Mo. 35; Bank of Penna. *v.* Stein, 24 Md. 447; Beymer *v.* Bonsall, 79 Pa. St. 298; Frame *v.* William Penn Coal Co., 97 Pa. St. 309.

those seats certain classes of the congregation may and others may not sit (*p*).

Summary]—It may be laid down generally that the incidental authority flowing from the original authority must be so construed as not to confer a power different in kind from the power conferred by that original authority. In order, however, to apply this principle in all cases, we must understand that in the original authority here referred to is included not only the authority conferred by the actual terms in which the authority is given, but that authority extended and modified by the ★ addition of all these [★ 142] powers which are by law implied from usage, mode of dealing, and other circumstances of a like character. Taking the word authority in this sense, it would be found that any act of the agent which is not of a like kind with the acts sanctioned by such authority in the wider sense of the term, is beyond the scope of the agent's authority.

(*p*) Asher *v.* Calcraft, 18 Q. B. Div. 607; and see Reynolds *v.* Monkton, 2 Moo. & R. 384.

[★ 143]

★ CHAPTER III.

IMPLIED AUTHORITY OF PARTICULAR CLASSES OF AGENTS.

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The Authority of Auctioneers.

Auctioneer agent for both parties.]—As a rule, one of two contracting parties cannot act as agent for the other, but in sales by auction the auctioneer is considered to be agent of both parties, so as to bind either the buyer or seller by his memorandum.

His authority and lien.]—An auctioneer has sufficient property in the goods sold to maintain an action against the buyer, but he has not a possession coupled with an interest, nor a bare custody, like a servant or shopman. There is no difference whether the sale be on the the premises of the owner or in a public auction-room. The auctioneer has also a special property in such goods, with a lien for the charges of sale, commission, and the auction duty (*a*). The catalogue and conditions may afford evidence that he has contracted personally, and so be liable for non-delivery of goods and the like (*b*). A bidding may be withdrawn at any time before the lot is knocked down (*c*).[1]

(*a*) Williams *v.* Millington, 1 H. Bl. 81, 84, 85; explained in Taplin *v.* Florence, 10 C. B. 744.
(*b*) Woolfe *v.* Horne, 2 Q. B. Div. 355.
(*c*) Warlow *v.* Harrison, 27 L. J., Q. B. 18.

[1] Gwathney *v.* Cason, 74 N. C. 5. Sales by auction are governed by the same law as private contracts; the parties thereto must assent and agree. Every bid by any one present is an offer by him and as soon as the hammer falls the bid is accepted and becomes a contract; but until it is accepted the bidder may withdraw it, because till then he is not bound. Grotenkemper *v.* Achtermeyer, 11 Kan. 222.

★ An auctioneer has implied authority— [★ 144]

(a) To prescribe the rules of bidding and the terms of sale (*d*):

(b) To bind his principal by his declarations made at the time of sale, provided such declarations are consistent with the written conditions (*e*):

(c) To sue the buyer in his own name (*f*).

But he has no implied authority—

(a) To receive the purchase-money for lands sold by him (*g*):[1]

(b) To employ another person to sell the property intrusted to him (*h*):

(c) To sell on credit (*i*):

(d) To allow the contract to be rescinded (*k*):

(e) To sell by private contract (*l*). It is no excuse that he has acted without fraud and obtained a larger sum than the price fixed (*m*):

(f) To buy property which he is commissioned to sell (*n*).

The Authority of Brokers.

A broker has implied authority—

(a) To sign the bought and sold note, and so bind both parties (*o*):

(b) To sell on credit in the absence of a usage to the contrary (*p*):[2]

(*d*) Paley, by Lloyd, 257; Story on Agency, § 107.
(*e*) *Ibid.*; Gunnis *v.* Enhart, 1 H. Bl. 290.
(*f*) Story on Agency, § 107, and cases cited.
(*g*) Sykes *v.* Giles, 5 M. & W. 645.
(*h*) Blore *v.* Sutton, 3 Mer. 237; Coles *v.* Trecothick, 9 Ves. jun. 254.
(*i*) Williams *v.* Millington, 1 H. Bl. 81.
(*k*) Nelson *v.* Aldridge, 2 Stark. 435.
(*l*) Wilkes *v.* Ellis, 2 H. Bl. 555.
(*m*) Daniels *v.* Adams, Amb. 495.
(*n*) See Tate *v.* Williamson, L. R., 2 Ch. 55.
(*o*) Parton *v.* Crofts, 16 C. B., N. S., 11.
(*p*) Boorman *v.* Brown, 3 Q. B. 511; Wiltshire *v.* Sims, 1 Camp. 258.

[1] Where the terms of sale contemplate the payment of money into the hands of the auctioneer by the purchaser at the time of the auction and before the completion of the sale, the auctioneer is not only entitled to receive it but may sue for such deposit in his own name. Thompson *v.* Kelly, 101 Mass. 29 It is the duty of an auctioneer to pay to the person for whom he sells, the proceeds of such sale. Tripp *v.* Barton, 13 R. I. 130.

Where the payment is to be in cash the auctioneer cannot receive a check on a bank payable the next day. Broughton *v.* Silloway, 114 Mass. 71.

[2] An agent having power to sell, unless expressly restricted and in the absence of the usage or custom to the contrary, may sell by sample or with warranty. Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; but in public sales there is no warranty, express or implied and neither a marshall nor his agent or auctioneer, has authority to give such warranty. The Monte Allegre, 9 Wheaton, 616.

Where the private instruction of the principal to the agent is, that, he shall not sell coal on credit and the principal subsequently consummates sales

(c) To adjust a policy if employed to subscribe it (*q*).[1]

Nature of his authority.] —The authorities are conclusive to show that a broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both; but the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract, and the [★ 145] signed entry in the broker's book is a ★ sufficient memorandum of the bargain to satisfy the Statute of Frauds (*r*).

A broker has no implied authority—

(a) To buy or sell in his own name (*s*).[2] The case of an insurance broker is an exception to this rule; he need not even state that he contracts as broker (*t*):

(b) To receive payment for goods sold for his principal (*u*).[3] But an insurance broker has authority to receive payment of any loss that may occur on a policy effected by him, if the instrument remains in his hands (*x*):

(c) To make freight under a charter-party entered into by him for his principal, payable to himself (*y*):

(d) To delegate his authority (*z*):[4]

(e) To pay losses for the underwriters who employ him (*a*).

(*q*) Richardson *v.* Anderson, 1 Camp. 43, note (*a*).
(*r*) Thompson *v.* Gardiner, L. R., 1 C. P. Div. 777.
(*s*) Baring *v.* Corrie, 2 B. & Ald. 137.
(*t*) De Vignier *v.* Swanson, 1 B. & P. 346, note (*b*).
(*u*) Campbell *v.* Hassell, 1 Stark. 233.
(*x*) Shee *v.* Clarkson, 12 East, 507.
(*y*) Walshe *v.* Provan, 8 Ex. 843.
(*z*) Henderson *v.* Barnewell, 1 Y. & Jer. 387.
(*a*) Bell *v.* Auldjo, 4 Doug. 48.

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on credit made by such agent, he will be bound to a third party for a similar sale on credit and forfeiture delivery made by the agent. White *v.* Fuller, 67 Barb. (N. Y.) 267.

Where, however, there is a custom that an agent for the sale of coal has no right, unless specially authorized, to make time contracts, anyone dealing with the agent will be bound by such custom, *id.*

[1] For general discussion of such authority, see Story on Agency, § 58, note.

[2] Pickering *v.* Demerritt, 100 Mass. 416. And usage of brokers to do so is bad. Day *v.* Holmes, 103 Mass. 306.

[3] And this is especially so when the principal is known to the vendee. Higgins *v.* Moore, 34 N. Y. 417. An agent employed to sell on credit cannot subsequently collect the price in the name of the principal, unless authorized so to do. Seiple *v.* Irwin, 30 Pa. St. 513.

One who sells by sample and on credit, and is not intrusted with possession of the goods, cannot receive payment. Butler *v.* Dorman, 68 Mo. 298.

[4] But an act which is merely mechanical or ministerial, and which does not require the exercise of discretion may be delegated to another: as when a broker's clerk reduced a contract to writing and signed the same under the supervision of the broker. Williams *v.* Wood, 16 Md. 220.

The Authority of Factors.

A factor has implied authority—

(a) To sell in his own name (*b*):[1]

(b) To sell upon reasonable credit (*c*):[2]

(c) To warrant (*d*):

(d) To receive payment and give receipts (*e*):

(e) To insure consignments on behalf of his principal (*f*).[3]

Insurances made by factors.]—Probably he may insure in his own name (*g*). Circumstances may occur under which the factor will be justified in effecting an insurance on cargo consigned by his principal to third parties, of which consignment the factor has merely been advised, by receiving the bill of lading and invoice with instructions to transmit them to the consignee (*h*).

★ A factor has no implied authority— [★ 146]

(a) To barter his principal's goods (*i*):[4]

(b) At common law, to pledge the goods intrusted to him. This rule still holds good except as far as it is modified by statute law:[5]

(*b*) Baring *v.* Corrie, 2 B. & Ald. 137.
(*c*) Houghton *v.* Matthews, 3 B. & P. 489.
(*d*) Pickering *v.* Busk, 15 East, 38, 45, per Bailey, J.
(*e*) Drinkwater *v.* Goodwin, Cowp. 256.
(*f*) Lucena *v.* Crawford, 2 B. & P. N. R. 269.
(*g*) See 1 Arnould, Insurance, 301.
(*h*) Russell on Merc. Ag., p. 51, citing Wolf *v.* Horncastle, 1 B. & P. 316.
(*i*) Guerreiro *v.* Peile, 3 B. & Ald. 616.

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[1] And he may buy in his own name. Story on Agency, § 110.

[2] A travelling agent authorized to sell all the goods he can within his business circuit, is considered the general agent of his principal, with power to fix price, time and mode of delivery of the goods and time of payment of the price; *i. e.*, in the absence of usage to the contrary. Private instructions, unless brought to the knowledge of third parties will not bind them. Burner *v.* Odlin, 51 N. H. 56; Burton *v.* Goodspeed, 69 Ill. 237. A commission merchant, receiving an order to sell at once, cannot sell on credit to one known to him to be irresponsible, and he is not liable if the goods depreciate upon his hands while waiting to effect a sale. Durant *v.* Fish, 40 Iowa, 559. See, also, Foster *v.* Waller, 75 Ill. 464.

[3] Factors having possession of their principals' goods are not bound to insure them. If they do not insure after receiving orders to insure, or a promise to do so, or where the usage of trade or the manner of dealing between them and their principals raises an obligation to do so, they themselves become the insurers and liable to their principals for any loss which arises in consequence. Shoenfield *v.* Fleisher, 73 Illi. 404; Lee *v.* Adsit, 37 N. Y. 78. It is sufficient if the insurance be effected in the name of the agent. Johnson *v.* Campbell, 120 Mass. 449.

An agent with power to insure cannot insure in a mutual company which would make the principal an insurer of others. White *v.* Madison, 26 N. Y. 117.

[4] Nor can he change the security for goods sold or make himself the debtor of his principal in lieu of the purchaser. Wheeler & Wilson Mfg. Co. *v.* Givan, 65 Mo. 89.

[5] Benny *v.* Rhodes, 18 Mo. 147; First National Bank of Macon *v.* Nelson, 38 Ga. 391. See Laussatt *v.* Lippincott, 6 S. & R. (Pa.) 386; and 2 Kent's Com.

(c) To delegate his authority (*k*):[1]
(d) To receive payment in any other than the usual mode (*l*):
(e) To compound the debt, or receive a composition in discharge (*m*):
(f) To accept or indorse bills on behalf of his principal (*n*).

The Authority of Masters of Ships.

Nature of their authority.]—The power of the master of a ship to bind his owners personally is a branch of the general law of agency. If a principal gives a mandate to an agent containing a condition that all contracts which the agent makes on behalf of his principal shall be subject to a defeasance, those who contract through that agent with notice of that mandate containing such a limit on his authority cannot hold the principal bound absolutely. As regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of the flag, and is limited by that law (*o*).

The master of a ship has an implied authority—
(a) To enter into lawful contracts relative to the usual employment of the ship (*p*):[2]
(b) To give a warranty in such contracts (*q*):
(c) To enter into contracts for repairs and necessaries to the ship (*r*); *e. g.*, for the supply of things necessary to the due prosecution of the voyage, such as provisions or money (*s*), provided the power of communication
[★ 147] ★ with the owner is not correspondent with the existing necessity (*t*), *i. e.*, provided the master, in pledging

(*k*) Cockran *v.* Irlam, 2 M. & S. 301.
(*l*) Underwood *v.* Nicholl, 17 C. B. 239.
(*m*) 3 Chitty, Com. & Man. 208, cited Russell, Merc. Ag. 48.
(*n*) Hogg *v.* Snaith, 1 Taunt. 347; Murray *v.* East India Company, 5 B. & Ald. 204.
(*o*) Lloyd *v.* Guibert, L. Rep., 1 Q. B. 115.
(*p*) Maclachlan's Merchant Shipping, p. 123; Boson *v.* Sandford, 1 Show. 29, 101; Ellis *v.* Turner, 8 T. R. 531.
(*q*) *Ibid.*, p. 129.
(*r*) Hussey *v.* Christie, 9 East, 426; Hoskins *v.* Slapton, Hardw. 376.
(*s*) Beldon *v.* Campbell, 6 Ex. 886; Proceeds of the Albert Crosby, L. Rep., 3 Adm. 37.
(*t*) Per Patteson, J., Johns *v.* Simons, 2 Q. B. 425, quoted Maclachlan's Shipping, p. 134.

625 (13th ed.); Wheeler & Wilson Mfg. Co. *v.* Givan, *supra*; Merchant's Nat. Bank of Memphis *v.* Trenholm, 12 Heisk. (Tenn.) 521.

[1] Bank *v.* Trenholm, *supra*.

[2] He cannot, however, by the mere virtue of his office, bind the owners of the vessel by a charter-party under seal, so as to make them liable to an action of covenant thereon. Pickering *v.* Holt, 6 Greenl. 160.

Nor can he bind the boat or its owners by a promissory note. Gregg *v.* Robbins, 28 Mo. 347. Nor can he indorse bills or execute notes so as to bind the owners. Holcroft *v.* Halbert, 16 Ind. 256.

the owner's credit, acts as a prudent man would under the circumstances (*u*).[1]

Repairs done, and supplies provided.]—The rule stated by Lord Tenterden in *Webster* v. *Seekamp* (*x*) is to the effect that the master may bind his owners for necessary repairs done or supplies provided for the ship. This authority of the master is not confined to what is absolutely necessary. Such a rule would be too narrow, for it would be extremely difficult to decide, and often impossible, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent in his absence is called upon to act. Whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel as a prudent man would have ordered if present at the time, comes within the meaning of the term "necessary" as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable (*y*).

Sale of perishable cargo.]—There is no ground for the proposition that the authority of the master to sell goods is to be measured differently when the goods become perishable owing to their own inherent vice at the time of shipment, and when they become so by the perils of the sea. The authority or the master is the same in both cases. *Primâ facie* he has no authority to sell. Whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owners before the goods actually perish, he cannot sell without communicating with him and obtaining his directions. Nor can he sell after receiving directions to the contrary (*z*). When goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight *pro ratâ itineris* (*a*). Necessity means necessity in the strict sense of the word (*b*).

★ *Sale of cargo in wrecked vessel—Power of master.*]—[★ 148] Until the year 1880, when Jessel, M. R., decided the case of *Atlantic Mar. Ins. Co.* v. *Huth* (*c*), which was affirmed on appeal, there was no direct authority as to the power of the master of a wrecked vessel to sell the cargo while in the wreck. The previous cases in which the right of the purchasers of cargo from the master had come

(*u*) Webster *v.* Seekamp, 4 B. & Ald. 352.
(*x*) *Supra.*
(*y*) See The Riga, L. Rep., 3 Ad. 516.
(*z*) See per Brett, L. J., Acatos *v.* Burns, L. R., 3 Ex. D. 290.
(*a*) *Ibid.*
(*b*) Atlantic Marine Mutual Insurance Co. *v.* Huth, 16 Ch. D. 474.
(*c*) 16 Ch. D. 474.

[1] When the business of a master of a boat is known, his general powers as agent of the owners, are matters of law, of which those dealing with the master must take notice. If they contract with him outside of these powers, the owners are not liable. Holcroft *v.* Halbert, 16 Ind. 256.

in question had been where the cargo had been on shore. The rule laid down by the Court of Appeal was that "purchasers of cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not, by any means available to him, carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination." Hence, where the master of a vessel wrecked within about 850 yards of the mainland, and within 50 miles of a port, sold the cargo, consisting largely of non-perishable goods, without making an effort either to procure funds for enabling him to save the cargo, or to induce others to undertake the salvage of the cargo, the court held that the sale could not be supported as against the owners of the cargo or the insurance company to whom they had surrendered their interest (*d*).

(d) To hypothecate the ship, freight and cargo, (*e*), if such a step is necessary, *i. e.*, provided the master cannot obtain personal credit (*f*), and provided the hypothecation is made in order to meet a high degree of need—a need which arises when choice is to be made of one of several alternatives, under the peril of severe loss if a wrong choice should be made (*g*):

Evidence which justifies hypothecation—Necessity.]—The existence of the necessity which validates the hypothecation by bottomry is to be ascertained by evidence in the usual manner, and the meaning of the term "necessity" in respect of hypothecation by the master is analogous to its meaning in other parts of the law (*h*). The power of the master to execute a bottomry bond does not depend upon the mere locality of the transaction, but upon the difficulty of [★ 149] communication between the master and ★ owners (*i*). If the power of communication between them is not correspondent to the necessity of the ship, the authority to borrow exists (*k*).

Powers of master as agent for owner of ship and owner of cargo distinguished.]—The power of the master arises out of his relation as agent both to the owner of the ship and to the owner of the cargo. A material distinction exists between his authority as agent for the one and as agent for the other; but in both cases his power to hypothecate, like his power to sell, arises out of the necessity of the case.

Limitations of his authority.]—Upon this cardinal principle—that necessity is the foundation of the master's authority—several

(*d*) *Ibid.* (*e*) The Trident, 1 W. Rob. Ad. 29.
(*f*) Heathorn *v.* Darling, 1 Moo. P. C. 8.
(*g*) Reg. *v.* Winsor, L. Rep., 1 Q. B. 394; The Karnak, L. Rep., 2 P. C. 512.
(*h*) See The Karnak, *supra*.
(*i*) *Per* Lord Stowell, La Ysabel Bozo, 1 Dods. Ad. 273; see, too, Kleinwort & Co. *v.* Cassa Maritima of Genoa, L. Rep., 2 P. C. 156.
(*k*) Maclachlan on Shipping, p. 142.

limitations of that authority have been established, which have been stated by Sir Robert Phillimore to the following effect :—

(1.) The master must endeavour to raise funds on the personal credit of the owners.

(2.) The money must be raised to defray the expense of necessary supplies or repairs of the ship, or to enable the ship to leave the port in which he gives the bond, and to carry the cargo to its destination.

(3.) The money must have been advanced in contemplation of a bottomry security, or, in other words, upon the security of the ship (*l*). A creditor who has furnished repairs upon personal credit cannot afterwards convert the personal debt into a bottomry transaction ; but in the case of a bottomry bond for money already supplied by a foreign lender without any previous agreement, there is, in the absence of all evidence, a presumption that the advances were made in contemplation of a bottomry security, and this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand (*m*).

(4.) To sell the cargo, provided he establishes—

(i.) A necessity for the sale :

(ii.) Inability to communicate with the owner, and obtain his directions.

★ *Circumstances that justify sale of goods.*]—The au- [★ 150] thority of the master of a ship to sell the goods of an absent owner is derived from the necessity of a situation in which he is placed ; and consequently, to justify his thus dealing with the goods, he must establish—(i.) a necessity for the sale ; and (ii.) inability to communicate with the owner, and obtain his directions. Under these conditions, and by the force of them, the master becomes the agent of the owner, not only with the power but under the obligation, within certain limits, of acting for him ; but he is not in any case entitled to substitute his own judgment for the will of the owner where it is possible to communicate with the owner, and ascertain his will (*n*).

Sale of damaged goods.]—When the goods are, in consequence of the perils insured against, lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, *i.e.*, according to the exposition in *Moss* v. *Smith* (*o*), whether to do so will cost more than they are worth. If the goods are in extreme and imminent danger of immediate de-

(*l*) The Alexander, 1 Dodson, 278.
(*m*) The Karnak, L. Rep., 2 A. & E. 289.
(*n*) The Australian Steam Navigation Co. *v.* Morse, L. Rep., 4 P. C. 222.
(*o*) 9 C. B. 94; 19 L. J., C. P. 225.

struction they may be justifiably sold, although in the event it turns out that they survive the peril, to the great benefit of the purchaser (*p*).

(e.) To sell the ship; but this authority is conditional on the existence of a twofold necessity, namely, inability to prosecute the voyage, and an immediate necessity to sell (*q*). What may be a sufficient reason for not continuing the voyage will not necessarily be a sufficient reason for the sale of the ship, *e.g.*, want of funds, or inability to execute repairs on the spot (*r*):

(f.) To borrow money on the security of the cargo for the purpose of the cargo only, *i.e.*, on *respondentia* (*s*):

(g.) To give to a creditor a right *in rem*, in cases other than bottomry bonds and *respondentia;* as, for instance, to [★ 151] draw a bill of exchange upon the ★ shipbroker for necessaries supplied in a colonial port, so as to enable the shipbroker to proceed against the ship as for necessaries supplied in default of payment of the amount due by the shipowner, the master being otherwise unable to obtain credit (*t*):

(h). When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master or warehouseman who has the custody of the goods under the Merchant Shipping Act, 1862, ss, 66—78, is justified in delivering to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be *bonâ fide* and without notice or knowledge of such prior indorsement (*u*).

The master of a ship has no implied authority—

(a.) To agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters (*x*):

(b.) To give a bottomry bond—

1. For necessaries already supplied, unless such bond had been stipulated for previous to the supply of the necessaries (*y*).
2. For his own debt (*z*).

(*p*) Farnworth *v.* Hyde, 14 C. B., N. S. 719.
(*q*) See Maclachlan Marit. Ship. 154, and cases cited.
(*r*) Hunter *v.* Parker, 7 M. & W. 322.
(*s*) Cargo ex Sultan, 5 Jur., N. S. 1060; The Glenmanna, Lush. 115; Maclachlan, p. 150.
(*t*) The Anna, 45 L. J., Ad. 98; 1 Prob. Div. 253.
(*u*) Glyn, Mills & Co. *v.* East & West India Dock Co., 7 App. Cas. 591.
(*x*) Burgon *v.* Sharpe, 2 Camp. 529.
(*y*) The Heresy, 3 Hagg. Ad. 404; and see The Lochiel, 2 W. Rob. 34.
(*z*) Dobson *v.* Lyall, 8 Jur. 969.

3. To free himself from arrest (*a*).
4. For general average charges (*b*).
5. To free the ship from detention (*c*):

(c.) To mortgage the ship or to assign the freight (*d*):

(d.) To bind the ship or cargo, to ransom either from the enemy (*e*):

(e.) To sell the whole of the cargo for the purpose of repairing the ship (*f*); but he may sell part (*g*):

A master cannot legally give a bond on cargo alone, or on ★ ship and cargo without freight; or, if he does so, the [★ 152] ship and freight must be exhausted before recourse can be had to the cargo (*h*).

(f.) To bind his owners by writing forward to a broker in a foreign port prior to the ship's arrival therein, authorizing the broker to charter his ship; nor is the master agent for his owners to hold out a person as authorized to charter the ship, so as to bind the owners (*i*):

(g.) To hold out a person as authorized to charter his ship, so as to bind the owners (*k*):

(h.) Where it is his duty to sign a bill of lading as presented to him, he has no authority to insert any additional term (*l*).

As to the Authority of Partners.

The act of one partner binds the firm—when.]—The general rule is, that the act or contract of one partner with reference to and in the ordinary course of the partnership business is the act or contract of the whole firm, and binding on them (*m*).[1] The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must be determined by the nature of the business, and by the practice of persons engaged in it. No answer of any value can be given to the abstract question—Can one partner bind his firm by such and such an act? Unless, having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is

(*a*) Smith *v.* Gould, 4 Moo. P. C. 21.
(*b*) The North Star, 1 Lush. 45.
(*c*) But see *per curiam* in The Karnak, L. Rep., 2 A. & E. 289.
(*d*) Willis *v.* Palmer, 29 L. J., C. P. 194.
(*e*) 22 Geo. 3, c. 25, ss. 1, 2.
(*f*) Duncan *v.* Benson, 1 Ex. 555.
(*g*) The Gratitudine, 3 C. Rob. 242.
(*h*) Per Sir Robt. Phillimore, The Karnak, L. Rep., 2 A. & E. 309.
(*i*) The Fanny, 48 L. T. 771.
(*k*) *Ibid.*
(*l*) Jones *v.* Hough, 5 Ex. Div. 115.
(*m*) Hawkins *v.* Bourne, 8 M. & W. 703, 710; Fox *v.* Clifton, 6 Bing. 776, 795.

[1] Story on Partnership, § 111.

one which is not necessary for carrying on any business whatever; there are very few acts of which any such assertions can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business but not in another (*n*).[1]

The Authority of Solicitors.

Authority conferred—General retainer.]—A solicitor may act under a general or special retainer. A solicitor acting under a [★ 153] ★ general retainer has an implied authority to accept service of process and appear for the client, but he has no such authority to commence an action unless such an authority may be reasonably inferred from the terms which were used in the retainer (*o*).[2] A. placed money in the hands of his solicitor, B., to invest for him, and gave to him an unlimited discretion to do what was best. B. advanced the money to C. on mortgage, but discovering that the security was bad, he sued out a bailable writ in A.'s name against C. for the amount without A.'s knowledge. There was no doubt about the *bona fides* of B. The court held that B. was not liable in an action for acting without authority (*p*).

Special retainer.]—A solicitor acting under a special retainer must observe its terms strictly, nor has he any authority to do more than is necessary to carry out with effect the business authorized by the retainer (*q*).

The client's liability.]—As between the client and the opponent, the former is bound by every act of his solicitor done in the ordinary course of practice (provided there is no collusion or fraud), whether it is authorized or not. Thus, if a solicitor pleads an improper plea, or brings the action in an improper form (*r*); or waives a judgment by default (*s*); or admits a fact to prevent the necessity of proving it at the trial (*t*); or sues out an irregular writ, whereby trespass is committed (*u*), the act binds the client. In all those cases where the solicitor, through acting negligently or against his instructions, binds his client to other parties, the solicitor, of course, may be liable to the client for the consequence of his negligence or breach of duty.

(*n*) 1 Lindley on Partnership, 251. See, too, p. 152, *infra*.
(*o*) Lush's Practice, vol. 1, 129; Chitty's Practice, vol. 1, 86; Anderson *v.* Watson, 3 C. & P. 214.
(*p*) Anderson *v.* Watson, *supra*.
(*q*) See 1 Chitty's Practice, 87, and cases cited.
(*r*) Payne *v.* Chute, 1 Roll. 365.
(*s*) La Tuch *v.* Pacherante, 1 Salk. 86.
(*t*) Blackstone *v.* Wilson, 26 L. J., Ex. 229.
(*u*) Parsons *v.* Lloyd, 3 Wils. 341.

[1] Story on Agency, § 124, note 125.

[2] "An attorney-at-law has authority, by virtue of his employment as such, to do on behalf of his client all acts in or out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only and not the cause of action." Moulton *v.* Bowker, 115 Mass. 40.

Instances of implied authority.]—The following are instances of implied authority in the absence of express prohibition:—

An authority to sue for a debt is an authority to receive payment (*x*). An order calling on a defendant to pay costs is authority to pay plaintiff's solicitors (*y*). An authority to bring an action authorizes the solicitor to order the sheriff to withdraw from possession under a *fi. fa.* (*z*), or to compromise client's case (*a*).

★ *Authority to make compromises*]—In order to justify [★ 154] a solicitor to enter into a compromise it would seem that he must be prepared to show—

1. That he acted *bonâ fide:*
2. That he acted with reasonable skill:
3. That he did not act in opposition to his client's express prohibition (*b*).

It is essential that there should be no express prohibition. If there is, it is no defence to say that the compromise was entered into by the advice of counsel employed by the solicitor for the conduct of the cause (*c*). In an action for goods sold and delivered, the plaintiff's solicitor has authority to enter into a compromise on the terms that the defendant shall return the goods and pay the costs (*d*). Although the authority of a solicitor is determined on final judgment being signed, yet if he is authorized to obtain satisfaction afterwards, he has authority to bind his client by compromise (*e*). A solicitor has full authority either to compromise or abandon the claims of his client, provided it is in a matter within the scope of the suit (*f*).[1]

Further illustrations]—A solicitor authorized to enter up judgment may enter an appearance (*g*). One authorized to show cause against a rule nisi for a mandamus may proceed to have the issues tried (*h*). One authorized to "do the needful" may act according to the circumstances (*i*). The authority of a solicitor, in an action in the Common Law Division of the Supreme Court, continues

(*x*) Yates *v.* Freckleton, 2 Doug. 623.
(*y*) Mason *v.* Whitehouse, 4 Bing. N. C. 692.
(*z*) Levy *v.* Abbott, 19 L. J., Ex. 36.
(*a*) Chambers *v.* Mason, 5 C. B., N. S. 59.
(*b*) Prestwick *v.* Poley, 18 C. B., N. S. 806; 12 L. T. Rep., N. S. 390; 34 L. J., C. P. 189.
(*c*) Fray *v.* Voules, 28 L. J., Q. B. 232; 33 L. T. Rep. 133.
(*d*) Pristwick *v.* Poley, *supra.*
(*e*) Butler *v.* Knight, L. Rep., 2 Ex. 109.
(*f*) *Re* Wood, 21 W. R. 104.
(*g*) Richardson *v.* Daly, 4 M. & W. 384.
(*h*) Reg. *v.* Lichfield, 10 Q. B. 534.
(*i*) Dawson *v.* Lawley, 4 Esp. 65.

[1] The decisions in this country are to the contrary and hold that the attorney cannot compromise without the client's authority or sanction; Stokeley *v.* Robinson, 34 Pa. St. 315; Housenick *v.* Miller, 93 Pa. St. 514; Mackey's Heirs *v.* Adair, 99 Pa. St. 143; Robinson *v.* Murray, 69 Ala. 543; Barrett *v.* The Third Ave. R. R., 45 N. Y. 628; Speers *v.* Lederberger, 56 Mo. 465.

up to signing final judgment (*k*). Lord Coke says, that an attorney's retainer to conduct a suit, enabled him to sue out execution under it at any time within a year after the judgment (*i. e.*, during the period when such an action might be brought), as well as to prosecute such execution afterwards (*l*).

Reference may also be made to the following *dicta*:—

The authority may continue after judgment.]—The authority of an attorney is in general determined after judgment, but he may still [★ 155] sue out execution and receive the money, and his ★receipt is then the same as that of the principal; and according to 1 Roll, Abr. 291, Attorney (M), cited in Com. Dig., Attorney B. (10), he may, after judgment, acknowledge satisfaction on the record (*m*). In *Bevins* v. *Hulme* (*n*), the court expressed an opinion that the original retainer of a solicitor was not determined by the judgment, but continued afterwards, so as to warrant him in issuing execution within the time limited (*o*). So it is said by the court in *Levy* v. *Abbott* (*p*): "The attorney in the suit has no right after judgment to settle the action on any other terms than payment of the debt and costs, and cannot discharge a defendant from custody on a *capias ad satisfaciendum* without receiving them (*q*): nor, by parity of reasoning, where there has been an extent under an *elegit*. But he has the power to direct and manage the execution against the goods. If two writs of *fi. fa.* are out at the same time in different counties, there is no reason why, if one is executed and the debt satisfied, he may not order the sheriff to quit the possession of goods seized under the other. So if the seizure is met by a claim to the goods, which he thinks is not worth while to dispute, or where the landlord's claim for rent would absorb the value of the goods, there seems no reason why he may not abandon, nor why he may not for any other cause, when he thinks it most conducive to the benefit of his client."

Mr. Justice Lush, in his work on Practice (p. 251), also expresses an opinion that the solicitor's authority is not determined by the obtaining of judgment, but that it remains in force until the judgment is satisfied (*r*).

Employment as permanent solicitor.]—A retainer of a solicitor to to act as permanent solicitor is not irrevocable; it simply denotes a general employment as contradistinguished from an occasional or special employment. A. agreed to become permanent solicitor to B., who after employing him upon that understanding for some

(*k*) See Cases cited Chitty's Practice, vol. 1, 67.
(*l*) 2 Inst. 378.
(*m*) Per Littledale J., Savory *v.* Chapman, 11 A. & E. 836.
(*n*) 15 M. & W. 96.
(*o*) See *per* Lord Ellenborough in Brakenbury *v.* Pell, 12 East, 588.
(*p*) 4 Ex. 588.
(*q*) Savory *v.* Chapman, 11 A. & E. 836.
(*r*) So in Chitty's Practice, vol. 1, 88.

time discharged him. In an action for breach of the agreement against B., the court held that A. could not recover (*s*).

To receive proceeds of sale—when.]—Where in an administration ★ action real estate is sold under an order of the [★ 156] court, and, the purchaser's deposit is paid by cheque drawn payable to the auctioneer or his order, it is within the scope of the authority of the solicitors who have the conduct of the sale, or of one of them, to apply to the auctioneer for the amount of the deposit for the purpose of paying it into court, even before the result of the sale is certified. Hence the firm will be liable if one member so receives the cheque and absconds (*t*).

To enter into undertaking.]—Where a solicitor enters into an unconditional undertaking on behalf of a client, it will be enforced summarily (*u*).

To indorse writ of execution.]—It is within the scope of a solicitor's authority to issue and indorse a writ of execution. Hence, if the solicitor indorses the writ incorrectly the execution creditor is liable (*v*). In *Jarmain* v. *Hooper* (*x*), Tindal, C. J., remarked that "the attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication, and in taking a step essentially necessary for the benefit of his client, that is, for obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority, though he has miscarried in his execution" (*y*). So it is within the scope of a solicitor's authority to direct the sheriff to withdraw (*z*). In *Collett* v. *Foster* (*a*) there was evidence of actual interference on the part of the execution creditor. Bramwell, B., intimated that he had a great desire to limit the doctrine of *respondeat superior*, and to make the actual wrong-doer alone responsible. In a subsequent case, decided in 1882, the court held that it is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods (*b*).

The following are instances where no authority was implied:—

To discharge defendant before payment, or postpone execution — An authority to act for plaintiff is no authority to discharge a dedefendant before payment (*c*). A solicitor has no implied ★ authority, where a defendant has been taken in [★ 157] execution upon a *ca. sa*, to discharge from custody upon any other

(*s*) Elderton *v.* Emmens, 4 C. B. 479; 16 L. J., C. P. 209.
(*t*) Biggs *v.* Bree, 51 L. J. Ch. 263.
(*u*) *In re* Woodfin, 51 L. J. Ch. 427.
(*v*) Jarmain *v.* Hooper, 6 M. & G. 850.
(*x*) 6 M. & G. 827.
(*y*) See Childers *v.* Wooler, 2 E. & E. 287; Collett *v.* Foster, 2 H. & N. 356; Parsons *v.* Lloyd, 3 Wils. 341.
(*z*) Levy *v.* Abbott, 4 Ex. 588.
(*a*) 2 H. & N. 356.
(*b*) Smith *v.* Veal, 9 Q. B. D. 34.
(*c*) Savory *v.* Chapman, 3 P. & D. 604.

terms than a satisfaction of the judgment (*d*); nor has he authority after judgment to settle an action on any other terms than payment of the debt and costs, and cannot discharge a defendant from custody on a *cap. ad. sat.* without receiving them (*e*). Nor can he, after judgment in favour of his client, enter into an agreement on his behalf to postpone execution (*f*).

To receive purchase-money.]—The possession by a vendor's solicitor of an executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to receive the purchase-money (*g*). A solicitor has no implied authority to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally (*h*).[1]

If he is instructed to reduce an oral agreement into writing, and to act and "do all that is necessary," he has authority to communicate the terms to the other party, and to bind his client by such communication (*i*).

Authority to pledge client's credit.]—A solicitor has no implied authority to pledge his client's credit to counsel by an express promise to pay his fees, so as to enable the latter to sue for them (*j*).

Action brought without authority.]—Where a solicitor brings an action without the authority of the plaintiff, the latter is entitled to have the proceedings stayed without payment of costs (*k*). He is now liable to pay the costs of both plaintiff and defendant (*l*).

In an early case (*m*), it is laid down that where an attorney takes upon him to appear, the court looks no further, but leaves the party to his action against him. *Robson* v. *Eaton* (*n*), a later case, [★158] is inconsistent with the former, which may be considered ★as overruled. Mr. Justice Blackburn, however, in *Reynolds* v. *Howell* (*o*), expressed an opinion that if a plaintiff after action brought in his name by an attorney without authority, hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act.

(*d*) Connop *v.* Challis, 2 Ex. 484; see 15 & 16 Vict. c. 76, s. 124.
(*e*) Savory *v.* Chapman, 11 A. & E. 829; Levi *v.* Abbott, 4 Ex. 590.
(*f*) Lovegrove *v.* White, L. Rep., 6 C. P, 440.
(*g*) Viney *v.* Chaplin, 2 De G. & J. 468; 27 L. J., Ch. 434; followed in *Ex parte* Swinbanks, 11 Ch. Div. 525.
(*h*) Bourdillon *v.* Roche, 27 L. J., Ch. 681; Viney *v.* Chaplin, *supra*.
(*i*) Smith *v.* Webster, 45 L. J., Ch. 430, 528; and see Owen *v.* Thomas, 3 My. & K. 353; Ridgway *v.* Wharton, 6 H. of L. Ca. 238.
(*j*) Mostyn *v.* Mostyn; *Ex parte* Barry, 5 L. Rep., Ch. 457; 39 L. J., Ch. 780; 22 L. T. Rep., N. S. 461.
(*k*) Reynolds *v.* Howell, L. Rep., 8 Q. B. 398; followed in Nurse *v.* Durnford, 41 L. T. 611.
(*l*) Newbiggen-by-the-Sea Gas Co. *v.* Armstrong, 13 Ch. Div. 810.
(*m*) *Anon.*, 1 Salk., 86, 88.
(*n*) 1 T. R. 62.
(*o*) *Supra*.

[1] See Gordon *v.* James, 30 Ch. D. 249 (1885); on the authority of a solicitor to receive mortgage money.

To direct seizure of particular goods,]—The solicitor of a judgment creditor who issues a *fi. fa.* has no implied authority to direct the sheriff to seize particular goods (*p*). If the solicitor interferes without authority, and so directs the sheriff, he, and not his client, is answerable (*q*).

To attend appeal in London.]—The right of a country solicitor to attend personally to an appeal in London was allowed by Bacon, V.-C., in *Re Foster* (*r*), on the ground "that he was probably better acquainted with the subject-matter than the London agent." This principle was dissented from by Pearson, J., in a case heard in 1884 (*s*), in which he held that the journeys of a country solicitor to town to attend counsel, and otherwise to conduct the proceedings in an action, ought to be allowed where the solicitor had authority from his client to make these charges, but that such journeys ought not to be allowed simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than the agent. The dissent of Pearson, J., however correct it may be, is no more than *obiter dictum*, since the solicitor in the case before him was held to have authority to make the journeys.

To receive notice of incumbrances generally.]—A solicitor who is employed by trustees in effecting an investment of the trust funds upon mortgage, has no implied authority so as to affect them with notices received by him of subsequent incumbrances or dealings by the *cestuis que trust* of the trust fund. The contrary opinion, which appears to have been held by Bacon V.-C., was characterised by James, L. J., as a monstrous proposition (*t*). Hence, where solicitors so acting received such notice, the Court of Appeal held that it was not a good notice to the trustees. The remarks of James, L. J., with reference to the position occupied by a solicitor, are worth quotation: "I have had occasion several times to express my opinion about the fallacy of ★ supposing that there [★ 159] is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor; and that, because the solicitor has been in the habit of acting for him, or been employed to do something for him, that solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such office known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher." The cases in bankruptcy where it has been held that notice to a person acting as solicitor was sufficient to take a *chose in action* out of the order and disposition of the assignor, were treated by his lordship as being of an exceptional character.

(*p*) Smith *v.* Veal, 9 Q. B. D. 340.
(*q*) *Ibid.*, per Jessel, M. R., p. 351. (*r*) 8 Ch. D. 598.
(*s*) *In re* Storer, 26 Ch. Div. 189.
(*t*) Saffron Waldon Benefit Building Society *v.* Rayner, 14 Ch. Div. 404.

To sue in name of London agent.]—A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record, and a plaintiff may have his name struck out of a writ on that ground (*u*). Chitty, J., doubted whether a retainer to a solicitor in the following terms, "I hereby authorize you to act as my solicitor in the administration of my late husband's estate, and authorize you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf," authorizes the issue of a writ (*x*).

To satisfy Statute of Frauds.]—A solicitor who is instructed to prepare a formal draft contract to be sent to the other side for perusal and approval, is not authorized to sign a memorandum within the meaning of the Statute of Frauds (*y*).

To act as scrivener.]—A solicitor has no implied authority to act as a scrivener.

A. and B. were attorneys in partnership. A sum of 1,670*l.* was paid by a client to A. (without the knowledge of B.) for the purpose of its being laid out on mortgage. The business of the firm was that of attorneys simply. Held, that B. was not liable to the client for the above sum (*z*).

"I think," said Lord Campbell, "that an attorney, *quâ* attorney, is not a scrivener. . . . . A scrivener has to hold the money put [★ 160] into his hands until he has the means of laying ★ it out; but this employment of scrivener is not a consequence of his acting as attorney" (*a*).

To undertake journeys for client.]—A solicitor has no implied authority to undertake journeys on behalf of his client, without special instructions. In *Re Snell, a Solicitor* (*b*), the Master of the Rolls and the Court of Appeal commented upon this rule at some length. A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a Chancery suit on behalf of the company. He was employed by another client to go to America, and whilst there collected information on behalf of the company in furtherance of their suit. He reported to the company what he had done, and they made use of the information. Subsequently he took three journeys to Paris to conduct negotiations for a compromise of the same suit. On two of these journeys he was accompanied by the chairman, and the three were undertaken with the knowledge of some of the directors. The taxing master allowed the charges made by the solicitor in respect of these journeys, but on a summons being taken out to review the taxation, the Master of the Rolls disal-

(*u*) Wray *v.* Kemp, 26 Ch. Div. 169.
(*x*) *Ibid.*; and see Atkinson *v.* Abbott, 3 Drew. 251.
(*y*) 3 Ch. D. 49.
(*z*) Harman *v.* Johnson, 2 E. & B. 61.
(*a*) See Earl of Dundonald *v.* Masterman, L. Rep., 7 Eq. 504; St. Aubyn *v.* Smart, *ib.*, 5 Eq. 183; and the remarks of Malins, V.-C., in Plumer *v.* Gregory, L. Rep. 18 Eq. 632.
(*b*) L. R., 5 Ch. Div. 815.

lowed them. "I have no hesitation," said his lordship, "in disallowing the first item. A solicitor has no right to take special journeys or to go to foreign countries at the expense of his client without specific instructions: nothing is better settled; otherwise the unfortunate client, in giving a retainer to a solicitor, would thereby authorize him to travel all over the world at his expense." His lordship thought that the rule was not altered by the fact that when the solicitor returned he had told the client that he had obtained such information. With reference to the charge for the journeys to Paris, the Master of the Rolls went on to say: "There is another ground on which this item should be disallowed, and it is this:—Where the client's special instructions are required, so that the general retainer of the solicitor does not cover the work done, and the solicitor swears to the special instructions, which were verbal only, and the client denies, and there is no further evidence, then, according to the rules laid down by my predecessor and constantly acted upon during the whole course of his judicial career, the solicitor cannot ask the court to ★ establish the case against the [★ 161] client, it being simply oath against oath, and nothing more. It is the duty of the solicitor to take instructions in writing, and if he chooses to neglect this duty and take a special journey without instructions in writing, he must take the consequences." On appeal the court decided first, as to the journey to America, that although specific instructions were not formally given as to the course to be pursued by him, yet it was perfectly well understood by the directors as well as by the solicitor that he would avail himself of any information he could obtain which might aid him in the advice he should tender to the company; but that if it were necessary that the giving of specific instructions should be established in order to entitle the solicitor to make the charge, there was not sufficient evidence that such instructions were given. Secondly, as to the business done in Paris, that after the solicitor's return from his last visit the directors adopted and acted upon what he had done. The appeal was accordingly allowed.

Conclusion from Re Snell.]—The following principles appear to be deducible from this case:—

(1.) As a general rule a solicitor has no authority to take special journeys or to go to a foreign country at the expense of his client without specific instructions.

(2.) Under special circumstances, however, a solicitor acting under a retainer without such instructions may be justified in incurring reasonable expenses on behalf of of his client, irrespective of any subsequent adoption.

(3.) In the latter case it is for the taxing master to decide what is reasonable; and the court will not be disposed to interfere with his discretion.

(4.) An allegation of special instructions is not made out where the instructions sworn to by the solicitor are

verbal only, and these are denied by the client. The duty of a solicitor is to take instructions in writing.

(5). The mere retainer of a solicitor to conduct a chancery suit does not give him authority to compromise it abroad.

(6) Where a solicitor acting under a general retainer does something which his retainer does not authorize, his act may be subsequently adopted by the client.

[★ 162] ★ *Other Agents.*

Agents for sale.]—An agent to sell has authority to do all that is necessary and usual in the course of the business of selling—*e. g.*, to warrant that guano contains 30 per cent. of phosphate of best quality (*c*).[1]

Auctioneer's clerk.]—An auctioneer's clerk has no authority to sign a memorandum within sect. 17 of the Statute of Frauds so as to bind the purchaser (*d*), unless there are circumstances, as in *Bird* v. *Boulter* (*e*), showing that such authority exists.

Bailiffs.]—A bailiff acting under a warrant of distress has an implied authority to receive the amount of rent and costs (*f*).

A bailiff has no implied authority to do illegal as distinguished from irregular acts.

The bailiff of a manor has no implied authority to make leases for years. His duty is to collect the rents, gather the fines, and look after the forfeitures. But the general bailiff has implied authority to make leases at will (*g*).

The authority of a bailiff to distrain is conferred upon him by his employer usually by a writing called a "warrant of distress," or "distress warrant;" but the distress may be made without any express authority, provided the person in whose behalf the distress was made assent to the act of the bailiff (*h*).

Banker and bank manager.]—It is not within the scope of a banker's business to make investments for customers.

In *Bishop* v. *Countess of Jersey* (*i*), 1854, a bill was filed against the members of a banking firm for the purpose of making them liable to repay to the plaintiff a sum of 5,000*l.*, of which she alleged she had been defrauded by a former member of the firm. From

(*c*) Dingle *v.* Hare, 7 C. B., N. S. 145; 29 L. J., C. P. 144.
(*d*) See *per* Blackburn J., in Peirce *v.* Corf, L. R., 9 Q. B, 210, p. 215.
(*e*) 4 B. & Ad. 443.
(*f*) Hatch *v.* Hale, 15 Q. B. 10.
(*g*) Shopland *v.* Rydler, Cro. Jac. 55.
(*h*) Trevillian *v.* Pine, 11 Mod. 112.
(*i*) 23 L. J. Ch. 483.

[1] McCormick *v.* Kelly, 28 Minn. 135; Randell *v.* Kehlor, 60 Me. 37; Murray *v* Brooks, 41 Iowa, 45; Bradford *v.* Bush, 10 Ala. 386; Dayton *v.* Hooglund, 39 Ohio St. 671; Palmer *v.* Hatch, 46 Mo. 585. Where the property is of a description not usually sold with a warranty, as in case of bank stock, there is no implied power to warrant. Smith *v.* Tracey, 36 N. Y. 82.

the evidence it appeared that A., the member in question, had advised the plaintiff, a customer of the bank, to sell out some Dutch stock. He told her the firm could procure for her better security, and that he had one in view. He told her the money was wanted by his own son, who was in trade. The plaintiff sold out the stock and paid the money into the bank; she then gave him a cheque to draw it out and invest it. He drew it out, misapplied it, and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, but it ★ did [★ 163] not appear by whom. All these transactions took place at the banking-house, and the plaintiff had no acquaintance or dealings with this member except as banker and a member of the firm. The other partners did not appear to have known of them at the time they took place. The Solicitor-General (Sir Richard Bethell), with whom was Mr. Cairns, contended, *inter alia*, upon the authority of *Wilett* v. *Chambers* (*k*) and *Rapp* v. *Latham* (*l*), that if one partner makes representations to a customer of the firm, however untrue they may be, the customer has a right to be put in the same position by the other partners as if the representation had been true. Vice-Chancellor Kindersley was of opinion that the defendants were not liable, on the ground that it was not within the scope of the business of bankers to seek or make investments generally for their customers, nor did the partners know of the dealings before the other partner absconded. No direct reference was made to the principle that where one of two innocent persons must suffer by the fraud of a third, he who enabled that person, by giving him credit, to commit the fraud shall be the sufferer.

If the partner in the above case had been acting within the scope of his authority, the result would have been different. Thus, in *Thompson* v. *Bell* (*m*), a decision of the Court of Exchequer in the same year, the manager of a joint-stock bank, at which the plaintiff kept a deposit account, represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of 400*l.*, and advised him to purchase the houses for 595*l.*; 400*l.* to be paid in discharge of the mortgage, and 195*l.* to the bank. The plaintiff consented, and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him 595*l.* The manager then gave the plaintiff a receipt in his own name, stating that 195*l.* was the balance of purchase money of the houses, and that 400*l.* was deposited with him to pay off the mortgage. He afterwards absconded with the 595*l.* The plaintiff having brought an action against the bank to recover the money, the jury found that the manager had authority to assign securities, that the manager intended to make the plaintiff believe, and the plaintiff did believe that the manager was acting in this transaction

(*k*) 2 Cowp. 814.
(*l*) 2 B. & Ald. 795.
(*m*) 10 Ex. 10; 23 L. J., Ex. 321.

[★ 164] as agent of the bank. The court held ★ that the bank was responsible for the money. The obvious conclusion from the findings of the jury was that the money was paid to the manager as agent of the bank. This distinguishes the case from *Bishop* v. *Countess of Jersey* (*h*).

Neither the arrest nor the prosecution of offenders is within the ordinary routine of banking business. Therefore neither is within the ordinary scope of a bank manager's authority. Hence, where such authority is relied on, evidence is required to show that the arrest or prosecution, as the case may be, is within the scope of the duties and acts which such manager is authorized to perform. That authority may be general or it may be special, and derive from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present or from which it might reasonably by supposed to be present (*i*).

Committee of lunatic.]—The committee of a lunatic, who is a creditor of a liquidating debtor, have no power to sign a proxy on his behalf or to waive any of his rights without the sanction of the Court of Lunacy (*k*).

Estate and house agent.]—An estate agent who is requested to find a purchaser of landed property, and to advertise it at a certain price, has no authority to enter into an open contract for sale (*l*), or to conclude a contract of sale (*m*).

House agent's must be licensed (*n*); land agents not required to be so (*o*).

A custom that a house agent who has once introduced a tenant of a furnished house for a season is entitled to commission upon all rent afterwards paid by that tenant in respect of that house, whatever arrangement may be made between the landlord and such [★ 165] tenant, is unreasonable and bad (*p*). A ★ house agent can claim only upon the rent of which his intervention has been the proximate cause. If a house is let for a fixed period with an option to renew, which is not acted upon, the agent has no claim (*q*).

(*h*) *Supra.*

(*i*) Bank of New South Wales *v.* Owston, 4 App. Ca. 270; 48 L. J., P. C. 25; 40 L. T. 500. The following cases were discussed in the judgment delivered by Sir Montague Smith:—Eastern Counties Ry. Co. and another *v.* Broom, 6 Ex. 314; Roe *v.* Birkenhead, &c. Co., 7 Ex. 36; Goff *v.* G. N. Ry. Co., 3 E. & E. 672; Edwards *v.* L. & N. W. Ry. Co., L. R., 5 C. P. 445; Moore *v.* Metropolitan Ry. Co., L. R., 8 Q. B. 36; Poulton *v.* L. & S. W. Ry. Co., L. R., 2 Q. B. 535; Allen *v.* L. & S. W. Ry. Co., L. R., 6 Q. B. 65.

(*k*) *Ex parte* Wood, *In re* Wright, L. R., 10 Ch. D. 554.

(*l*) Hamer *v.* Sharp, L. R., 19 Eq. 108, *supra*, p. 139.

(*m*) *Ibid.*, and Whilde *v.* Watson, 1 Ir. Ch. D. 402.

(*n*) 24 & 25 Vict. c. 21, s. 10. (*o*) *Ibid.* s. 13.

(*p*) See per Willes, J., in Curtis *v.* Nixon, 24 L. T. 706, distinguishing Green *v.* Bartlett, 14 C. B., N. S. 631. (*q*) *Ibid.*

A power "to manage and superintend" estates gives an authority to contract for the granting of customary leases according to the nature and locality of the property to be demised (*r*).

Land agents.]—Two questions, apart from the real decision in the case, where raised in *Ramsden* v. *Thornton* (*s*). The first was whether an agent, having authority to let lands, can bind his principal by a stipulation that in certain events the tenant shall be entitled to have a lease upon certain terms. The second was whether a court of equity would allow a principal to set up want of authority in his agent if the former knew that a stranger was dealing with the latter under the belief that all statements made by the agent were warranted by the principal, and, so knowing, allowed the stranger to expend money in that belief.

Joint tenants and tenants in common.]—One of several joint tenants has implied authority to sign a warrant of distress, and to appoint a bailiff to distrain for rent due to all (*t*). The same rule applies to one of several co-heirs in gavelkind (*u*), but not to one of several tenants in common (*x*). One of several co-parceners may sign on behalf of herself and the others (*y*).

Manager of company.]—The manager of a company is not entitled as such to sign the firm's name or name of the partnership (*z*).

Directors of benefit building society.]—The managers or directors of a benefit building society, whose constitution is governed by 6 & 7 Will. 4, c. 32, have no implied powers of borrowing money so as to bind the society (*a*), although the provisions of that act do not preclude the members from authorizing their managers to borrow for the legitimite purposes of the society's business (*b*).

★ *Manager of public-house.*]—It is not incidental to [★ 166] the business of a public-house that the manager should buy spirits on credit, and he has no such implied authority to deal with persons to whom he has not been held out as being so authorized (*c*).

As to the authority of managers of mines, see *Ex parte Chippendale* (*d*).

Married Woman.]—The implied authority of a wife to pledge her husband's credit flows from—

1. The fact of marriage, and
2. The law relating to principal and agent.

First, as to the liability which flows from the fact of marriage.

(*r*) Peers *v.* Sneyd, 17 Beav. 151.
(*s*) L. R., 1 H. of L. 129. See *supra*, p. 19.
(*t*) Robinson *v.* Hoffman, 4 Bing. 562.
(*u*) Leigh *v.* Shepherd, 2 Brod. & B. 465.
(*x*) Cooper *v.* Fletcher, 34 L. J., Q. B. 187.
(*y*) Leigh *v.* Shepherd, *supra*.
(*z*) Beveridge *v.* Beveridge, L. R., 2 Sc. & Div. 183.
(*a*) Brooks & Co. *v.* Blackburn Benefit Society, 9 App. Ca. 857.
(*b*) Agnew *v.* Murray, 9 App. Ca. 519.
(*c*) Daun *v.* Simmins, 41 L. T. 783. (*d*) 4 De G., M. & G. 40.

This liability also is sometimes spoken of as flowing from the liability of a principal for the contracts of his agent, but incorrectly inasmuch as the obligation cannot be determined at the will of the husband, whilst, like any other principal, he is at liberty to revoke any authority which the wife exercises simply as his agent.

Lord Selborne, C., in *Debenham* v. *Mellon* (*e*), stated the law in the following terms:—"According to all the authorities there is no such mandate in law (*i. e.*, one making the wife an agent to pledge the husband's credit), from the fact of marriage only, except in the particular case of necessity; a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her, but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing. Nor is such authority implied from the fact of cohabitation" (*f*).

Where the husband and wife cohabit, a wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband [★ 167] chooses to live (*g*); or for goods, if she ★ carries on a separate business with the concurrence of her husband suitable for such trade (*h*).

But no authority will be implied if the order is of an extravagant nature (*i*); or if the wife has a separate income (*j*); or if credit was given exclusively to the wife (*k*); or if she has no authority in fact, and the husband has not held her out as having such authority (*l*); or if the goods supplied were not necessarily suitable to the style in which her husband lived (*m*); or if the wife was supplied with a sufficient allowance (*n*); or if the tradesman has had express notice not to give credit (*o*).

The adultery of a wife living apart from her husband destroys

(*e*) 6 App. Ca. 24; and see Jolly v. Rees, 33 L. J., C. P. 177; 15 C. B., N. S. 628.
(*f*) *Ibid.*
(*g*) Waithman v. Wakefield, 1 Camp. 120; Meredith v. Footner, 12 L. J., Ex. 183; 11 M. & W. 202; Montague v. Benedict, 3 B. & C. 631.
(*h*) Phillipson v. Hayter, L. R., 6 C. P. 38.
(*i*) Lane v. Ironmonger, 13 M. & W. 368; 14 L. J., Ex. 35; Freestone v. Butcher, 9 C. & P. 643.
(*j*) Freestone v. Butcher, *ubi supra*.
(*k*) Jewsbury v. Newbold, 26 L. J., Ex. 247.
(*l*) Jolly v. Rees, 15 C. B., N. S. 628; 33 L. J., C. P. 177; Debenham v. Mellon, 6 App. Ca. 24; 50 L. J., Q. B. 155.
(*m*) Seaton v. Benedict, 5 Bing. 28.
(*n*) Atkins v. Pearce, 2 C. B., N. S. 763.
(*o*) Manby v. Scott, 2 Sm. L. C. 429.

her implied authority to bind him by her contracts for necessaries (*p*).

The authority of a wife to pledge her husband's credit is no greater where the husband is a lunatic than in the ordinary case of husband and wife (*q*). Hence, where the wife of a lunatic ordered necessary repairs to be done to his house, and received ample funds to pay for the repairs, the Queen's Bench held that he was not liable for them to the contractor (*r*).

Official assignees.]—An official assignee has *primâ facie* authority to release an insolvent's equity of redemption to a mortgagee (*s*).

Partners.]—A partner has an implied authority, notwithstanding the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, to make a payment on account of a debt due by the firm, so as to take the debt out of the Statute of Limitations as against the other partners (*t*).

A partner has authority to deal with the partnership property for partnership purposes (*u*). But a partner has no implied authority to issue bills purporting to be accepted by the firm, but with the drawer's name in blank (*v*).

★ *Railway porter.*]—The porter of a railway company [★ 168] is acting within the scope of his authority in taking charge of an intending passenger's luggage whilst he is getting a ticket (*x*).

Receivers of rents.]—A receiver of rent has no implied authority to determine a tenancy (*y*); but if he has power to let also, he has such authority (*z*), whether appointed by the High Court or not (*a*). So the landlord's agent who manages the property has authority to receive a tenant's notice to quit (*b*); but a mere collector has no such authority (*c*).

Secretaries.]—A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority

(*p*) Cooper *v.* Lloyd, 6 C. B., N. S. 519; Culley *v.* Charman, 7 Q. B. Div. 89; Reg. *v.* Flinton, 1 B. & Ad. 227.
(*q*) Richardson *v.* Dubois, L. R., 5 Q. B. 51.
(*r*) *Ibid.*
(*s*) Melbourne Banking Corporation *v.* Brougham, 4 App. Cas. 156.
(*t*) Goodwin *v.* Parton, 42 L. T. 568.
(*u*) *Ex parte* Darlington, &c., Banking Co., 4 De G., J. & S. 581, per Lord Westbury.
(*v*) Hogarth *v.* Latham, 3 Q. B. Div. 643.
(*x*) Bunch *v.* G. W. Ry. Co., 17 Q. B. D. 215.
(*y*) Per Parke, J., Doe *v.* Walters, 10 B. & C. 633.
(*z*) Per Patteson, J., Doe *v.* Mizen, 2 M. & Rob. 56.
(*a*) Wilkinson *v.* Colley, 5 Burr. 2694; Doe *v.* Read, 12 East, 57.
(*b*) Papillon *v.* Brunton, 5 H. & N. 518.
(*c*) Pearse *v.* Boulter, 2 F. & F. 133.

to make representations to induce persons to enter into contracts (*d*).

The secretary of a tramway company has no implied authority to make representations with regard to the financial situation and relations of the company (*e*).

Ship's husband.]—A ship's husband, if managing owner, has authority to bind his co-owner by giving a bail-bond to release the ship from arrest in a suit for collision (*f*), or by giving an order for necessaries (*g*), and for work done to the ship, unless exclusive credit was given to the ship's husband (*h*). A ship's husband as such has no authority to pledge the owner to the expenses of a law suit (*i*).[1]

A new question as to his authority was raised in 1878 in *Thomas* v. *Lewis* (*k*). The court held that a ship's husband, who has the authority of the owners of the ship to enter into a charter-party, [★ 169] and who has accordingly made a charter-party, ★ by which commission on the freight, primage and demurrage, is stipulated to be due to the charterers on the execution of the charter-party, has not, without the express sanction of the owners, power to bind them by an agreement to cancel the charter-party and pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners. Cleasby, B., decided the case on the ground that the arrangement was entered into on the personal credit of the ship's husband. This case does not conclusively settle the question whether such an agent has implied authority to cancel a charter-party.

Telegraph clerks.]—The post office authorities are only agents to transmit messages in the terms in which the senders deliver them. If the telegraph clerk makes a mistake in the transmission of the message, the sender is not liable for damage sustained by the receiver (*l*).[2]

(*d*) Barnett *v.* South London Tramways Co., 18 Q. B. D. 815, per Lord Esher, M. R.; and see Newlands *v.* National Employers' Acc. Ass., 54 L. J., Q. B. 428; 53 L. T. 242.

(*e*) Barnett *v.* South London Tramways Co., 18 Q. B. D. 815.

(*f*) Barker *v.* Highley. 15 C. B., N. S. 37; 32 L. J., C. P. 270.

(*g*) Whitwell *v.* Perrin, 4 C. B., N. S. 412.

(*h*) Thompson *v.* Finden, 4 C. & P. 158; and see Robinson *v.* Read, 9 B. & C. 449.

(*i*) Campbell *v.* Stein, 6 Dow. 135.

(*k*) 3 Ex. Div. 18.

(*l*) Henkel *v.* Pope, L. R., 6 Ex. 7.

[1] He cannot procure a policy of insurance on the ship, either in port or out of it, for the voyage, without some express or implied assent of the owner. Story on Agency, § 36.

[2] The law in this country is different. Here telegraph companies are agents of the public and bound to transmit all messages tendered if accompanied by payment of the charges. The company is liable in damages for all mistakes made by its agent in sending the message, and this is so, even though the sender of the message is compelled to write it upon a paper on which there is

Under-sheriff.]—An under-sheriff has no authority to charge the sheriff by his declarations, unless they accompany some official act, or unless they tend to charge himself (*m*).

(*m*) Snowball *v.* Goodriche (1833), 4 B. & Ad. 541.

a condition exonerating the company from liability for any mistake made in its transmission.

Their duty is to send the message as delivered. Tyler *v.* West. Union Tel. Co., 60 Ill. 421; Bartlett *v.* West. Union Tel. Co., 62 Me. 209; West. Union Tel. Co. *v.* Ferguson, 57 Ind. 495; The N. Y. & W. P. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Squire *v.* West. Union Tel. Co., 98 Mass. 232.

[★ 170] ★CHAPTER IV.

OF THE LIMITS OF AN AGENT'S AUTHORITY.

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SECT. 1.—*Of the Extension of the actual Authority.*

The authority may be extended in various ways.]—The authority with which an agent is invested is not necessarily confined to the performance of those actions alone which are authorized by the bare words in which an authority is conveyed. On the contrary, it is rarely so confined. Generally speaking, the authority may be extended in a variety of ways by the operation of a number of rules and principles, some of which have already been discussed. There now remains for consideration the influence of the principal's conduct in extending the original authority.

Influence of the principal's conduct]—The rule applicable to this branch of law has been laid down with great clearness in the work of a learned writer upon mercantile law. The only ground of liability on the part of a principal to third parties dealing with an [★ 171] agent for the acts of the agent done in excess ★ of the power given him, and which he would be held to have even in a question between himself and the principal, is such *culpa* or *quasi-culpa* on the principal's part as would be a relevant ground for the plea of estoppel against his pleading the actual terms of the authority given to the agent. Where the principal by his words or conduct wilfully causes another to believe the existence of certain

powers in the agent, and induces him to deal with the agent in that belief; where the principal has by words or by conduct made a representation to another as to the agent's authority in order to induce others to act upon it; and where the representation or conduct complained of, whether active or passive in its character, has been intended to bring about the result whereby that other dealing with the agent has altered his position to his loss—in such a case, and in such a case alone, will the doctrine of estoppel apply to bar the principal from pleading against the third party the terms of the real authority which he gave to the agent.[1] Mere negligence is not of itself a ground of estoppel (*a*). The importance of the rules defining the limits of an agent's authority will fully appear when it is remembered that an agent's power to bind his principal is limited to the scope of his apparent authority (*b*).

Agent allowed to appear as principal.]—There is a number of cases under this head in which the agent has been allowed to hold himself out as a principal.

In *Ramazotti* v. *Bowring* (*c*), 1860, N., representing himself to be the proprietor of a certain business carried on under the name of the Continental Wine Company, induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was really only clerk to the plaintiff, who was the real proprietor of the establishment. The name of the plaintiff appeared over the entrance to the cellars, but it was not visible to persons going to the counting-house. The plaintiff's name also appeared (though in an ambigous manner) upon a receipt signed by one of the defendants on the delivery of some of the goods. In an action brought for the price of the goods, the Common Serjeant left it to the jury to say whether the plaintiff or N. was the real owner of the business, and told them that if they were of opinion ★that N. was the real owner, they must find [★172] their verdict for their defendants; but that if they thought the plaintiff was the owner, they must find for him. A verdict for the plaintiff was returned. A rule *nisi* for a new trial on the ground of misdirection was obtained, and afterwards made absolute. "I think," said Erle, C. J., "the proper question was not put to the jury. . . . The proper question under the circumstances would have been whether Ramazotti so conducted himself as to enable

(*a*) Bell, Commentaries, iii., I. 3, n. 5.
(*b*) Olding *v.* Smith, 16 Jur., Q. B. 497.
(*c*) 29 L. J., C. P. 30; 7 C. B., N. S. 85.

[1] Fowle *v.* Leavitt, 23 N. H. 360; McCoy *v.* McKowen, 26 Miss. 487; Johnson *v.* Wingate, 29 Me. 404; Lawson *v.* Chicago, &c., R. R., 64 Wis. 447; Lake Shore R. R. *v.* Foster, 104 Ind. 293; Lewis *v.* Farrell, 51 Conn. 216.

Where a State authorizes its Governor to issue bonds for the purpose of raising money and to appoint agents to effect the loan, acquiescence, by the Governor, in the acts done by the agent, in excess of his private instructions, will not estop the State in setting such acts aside; Delafield *v.* State of Illinois, 26 Wend. 190.

Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether the defendants in dealing with Nixon believed him to be the owner." Other points were raised in the course of the arguments, but it is not necessary to discuss them here.

The Court of Queen's Bench had a similar question before them in *Edmunds* v. *Bushell and Jones* (*d*), 1865. The defendant J. carried on business at Luton and in London. The business in the latter place was carried on in the name of Bushell and Co. J. employed B. to manage his business, and carry it on in the above name. The drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. accepted a bill in the name of "Bushell & Co.," and the court held that J. was liable on the bill in the hands of an indorsee, who took it without any knowledge of B. and J. or the business.

The principal's liability depends upon the apparent scope of the authority.]—The question to be considered, so far as the liability of the plaintiff to third parties is concerned, is whether the agent's act is within the apparent scope of his authority. Thus, where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had never been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority in the course of his employment to give such a receipt (*e*).[1] Where the defendants' confidential clerk had been accustomed to draw cheques for them, and in one instance at least they had authorized him to indorse, and in two other instances had received money obtained by his indorsing in their name, a jury is warranted in inferring that the clerk had a general authority to indorse (*f*); but a [★ 173] farm ★ bailiff has no implied authority to pledge his employer's credit by drawing and indorsing with or in his name (*g*).

SECT. 2.—*Limitations of an Agent's Authority.*

Questions between principal and agent to be distinguished from those between principal and third parties.]—In considering the true limits of the authority of an agent a distinction must be made.

(*d*) L. Rep., 1 Q. B. 97.
(*e*) Coleman *v.* Riches, 24 L. J., C. P. 125.
(*f*) Prescott *v.* Flinn, 9 Bing. 19.
(*g*) Davidson *v.* Stanley, 2 M. & G. 721.

[1] Where it is the duty of a baggage master to receive baggage, and he does so, but in violation of the rules and regulations of the company the company will be liable to the owner for any loss, provided the latter did not know, at the time, that the baggage master was acting contrary to his orders. Lake Shore & Mich. S. R. R. *v.* Foster, 104 Ind. 293.

Questions may arise either between a plaintiff and third parties who have dealt *bonâ fide* with the agent of that principal, or between the principal and the agent. The construction of the authority will be different in each of those cases respectively. In the former case, the true limit of the agent's power to bind the principal will be the apparent authority with which the agent is invested: in the latter case, the true limit of his authority will be marked by the express authority or instructions given to the agent; nor will it be extended by the addition of any implied powers inconsistent with such authority and instructions.

Fenn v. *Harrison* (*h*), 1790, was an action brought upon a bill of exchange. L. and C. drew a bill of exchange on G. and J., in favour of N., and indorsed it to the defendants, who employed one F. Huet to get it discounted. They told him to carry it to market and get cash for it, but they would not indorse it. He applied to his brother to get the bill discounted, informing him that it was the defendants' bill, and that though they did not choose to indorse it, their number was on it, which was the same thing, and that he would indemnify the brother if he himself indorsed the bill. The plaintiffs discounted the bill, but only upon condition that it was indorsed by the brothers. They knew nothing of the real owner. G. and J. subsequently became bankrupt, and the plaintiffs having heard that the bill had passed through the defendants' hands, applied to them for payment. At the first trial a verdict was given for the plaintiffs. The court granted a new trial, and Lord Kenyon left it to the jury to say whether J. Huet, the brother, had made himself answerable to the plaintiffs, as agent for the defendants. They were ★ of that opinion, and found a verdict for the [★ 174] plaintiffs a second time. This verdict was again set aside and a new trial granted. Lord Kenyon was on the whole disposed to admit the plaintiffs' claim. "The difficulty I meet with," said his lordship, "is this: This is not an action wherein F. Huet calls on the defendants for an indemnity; if it were, I admit that, as he exceeded the authority of his principal, he could not recover against him. But here J. Huet, who is an innocent man, and not involved in the misconduct of his brother, F. Huet, has a claim on the defendant . . . It is clear that the defendants might resort to J. Huet for payment, and that brings it to this question, whether J. Huet, who took the bill from F. Huet, knowing him to be the agent of the defendants, has not a right to call on the defendants, who constituted F. Huet their agent, although that agent exceeded his authority. I think that he has." The other judges were of opinion that the defendants were not liable—chiefly on the ground that F. Huet was expressly directed by the defendants not to indorse the bill. At the third trial the evidence varied, and it was not proved that the defendants told their agent that they would not in-

(*h*) 3 T. R. 757; 4 *ib.* 177.

dorse the bill. A verdict was again found for the plaintiffs, and a rule to grant a new trial refused. Ashurst, Buller, and Grose, JJ., said that unless the evidence on this trial had varied in the above manner from that given before, they would have continued to entertain the same opinion which they delivered on the former occasion, namely, that the defendants were not liable.

Sale made by broker who has indicia *of property.*]—In *Pickering* v. *Busk* (*i*), in 1812, the principles applicable to this branch of law were stated clearly and explicitly. This was an action in trover. The following facts were proved at the trial before Lord Ellenborough: A broker in the hemp trade had bought for the plaintiff a parcel of hemp, which was delivered to the broker at the request of the plaintiff by a transfer in the books of the wharfinger from the name of the seller to that of the broker. The broker afterwards bought another parcel of hemp for the plaintiff. This parcel was transferred to the names of "Pickering (the plaintiff), or Swallow (the broker)." The plaintiff paid for both parcels. While the parcels were lying at the wharves, the broker sold and trans- [★ 175] ferred them to H. & Co., ★ who soon afterwards became bankrupt. The assignees refused to restore the hemp. Lord Ellenborough directed the jury that the transfer by direction of the plaintiff into the broker's name, authorized him to deal with it as owner with respect to third persons, and that the plaintiff, who had thus enabled him to assume the appearence of ownership to the world, must abide the consequences of his own act. The jury found for the defendants, and leave to move to set the verdict aside was reserved to the plaintiff. A rule was accordingly obtained by the Attorney-General (Sir Vicary Gibbs), and supported on the authority of *M'Combie* v. *Davies* (*k*), and *Paterson* v. *Tash* (*l*), but discharged by the full court, on the ground that the broker's apparent authority could not be limited by any private communications.

"Strangers," said Lord Ellenborough, C. J., "can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter. . . . The present case is not the case of a pawn, but of a sale by a broker, having the possession for the purpose of sale. The sale was made by a person

(*i*) 15 East, 38.
(*k*) 6 East, 538.
(*l*) 2 Str. 1178.

who had all the *indicia* of property." The case is thus distinguished from the authorities upon which the argument in support of the rule was based.

Limits of authority gathered from general dealing, not from private instructions—Illustrations.]—*Whitehead* v. *Tuckett* (*m*) was decided by the same court in the same year. The action was in trover to recover certain hogsheads of sugar, which the plaintiff purchased of the defendant's brokers. The defence was that the brokers had been entrusted with the sugar for the purposes of sale under a limited authority. The custom was for these brokers to buy, pay for, sell or receive the value of sugars, on speculation in their own names and upon their own judgment, ★ but [★ 176] for their principals. Occasionally, when the market was low, they were under an unlimited authority as to quantity and price; at other times under special instructions to buy, but guided from time to time by special instructions to sell, limited in respect of price, and advised from time to time as to the probable rise or fall of the market. They kept only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and re-sold The particular sugars in dispute had been purchased and paid for in their own names by the brokers, and lodged in their own warehouse, but sold under the price directed by the defendant. After receipt of the money on his behalf they failed. At the trial a verdict was found for the plaintiff, and this was allowed to stand, on the ground that the limits of the broker's authority were to be gathered, not from their private instructions as to the particular parcel of goods, but from their general dealing.

This decision was mentioned with approval by Lord Cottenham in the case of *The Duke of Beaufort* v. *Neeld* (*n*), decided by the House of Lords in 1845. "This principle," said his lordship, "is acted upon at law as well as in equity, to prove which I referred to *Whitehead* v. *Tuckett* (*o*) . . . The principle is, I conceive, perfectly, plain and well established; and can there be a question as to whether this case falls within it? Did not the paper signed by the duke hold out to all who might negotiate with Mr. W. (the agent) or the commissioner, reason to believe that the duke was willing to take any land that might be agreed upon in exchange for Dunley Gorse? Having given this general authority, can he be heard to say that this authority was limited by private instructions, of which those who dealt with the agent know nothing?" To the same effect are the observations of Lord Brougham: "The duke knew, no doubt, that he had tied up W.'s hands by a particular instruction, and W. ought to have taken care that that instruction was communicated to those before whom he appeared

(*m*) 15 East, 400.
(*n*) 12 Cl. & F. 248, 290.
(*o*) *Supra.*

clothed with a general authority, which instruction, not being communicated, would leave him clothed with an absolute authority."

In *Summers* v. *Solomon* (*p*), 1857, one of the defendant's shops was under the management of his nephew, who was in the [★ 177] habit ★ of ordering goods of the plaintiff in the name of the defendant, who paid for them. In November, 1855, the plaintiff received two orders for jewellery from his nephew. The goods were sent to and acknowledged by the defendant as ordered by him. On the 7th March, 1856, the nephew absconded, and obtained on the 10th, 14th and 20th of the same month a quantity of jewellery, the subject of the action, from the plaintiff. A verdict for the amount claimed was taken, with leave to enter it for the defendant if the court should be of opinion that there was not reasonable evidence to warrant a jury in finding for the plaintiff. The court was of opinion that there was evidence, and the verdict was not disturbed. "The question," said Mr. Justice Coleridge, "is not what was the exact relation between the defendant and Abraham (the nephew), but whether the defendant had so conducted himself, and held the other out, as to lead the plaintiff reasonably to suppose that he was the defendant's general agent for the purpose of ordering goods." In *Hazard* v. *Treadwell* (*q*), an early case, 1768, Lord Kenyon held, that one instance of recognition of a servant by the master to purchase goods on his credit was sufficient to make the master liable for subsequent orders of the servant, until the authority was known to have been withdrawn. In the present case, the nephew had previously ordered the goods to be sent to the shop—the variation in the place and mode of delivery was held to be immaterial.

The question for the jury is, whether from such a recognition a tradesman would be justified in inferring a general authority from the principal to the agent to deal for him on credit in respect of the same description of goods (*r*).

For other authorities reference may be made to *Prescott* v. *Flinn* (*s*); *Levy* v. *Pyne* (*t*); *Davidson* v. *Stanley* (*u*).

(*p*) 26 L. J., Q. B. 301.
(*q*) 1 Str. 506.
(*r*) See Paley, by Lloyd, 163.
(*s*) 9 Bing. 19.
(*t*) Car. & Mar. 453.
(*u*) 2 M. & G. 721.

★ CHAPTER V. [★ 178]

OF THE CONSTRUCTION OF AN AGENT'S AUTHORITY.

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SECT. 1.—*Where the Authority is given by a Formal Instrument.*

Construction of instruments conferring authority.]—When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to:—

1. The meaning of general words in the instrument will be restricted by the context, and construed accordingly.[1]
2. The authority will be construed strictly so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.[2]

[1] General words in a power of attorney cannot be construed so as to give the agent powers which are not expressed in the other parts of the instrument; as a power "to ask, demand, receive and receipt for any and all pay and allowances due me from the Government of the United States on account of my service (in the Army), &c., and to sign my name to any receipt, pay roll, voucher or other acquittance of such dues; with full power to execute and deliver all needful instruments and papers and to perform all and every act and thing whatsoever requisite and necessary to be done in, and about the premises" with the usual ratifying and confirming clause; it was held that the attorney could not endorse drafts upon the assistant treasurer of the United States and payable to his principal or order; Holtzinger *v.* The Nat. Corn Ex. Bank, 37 How. Pr. 203.

[2] A power of attorney "to negotiate, compromise, adjust, determine, settle

With reference to the latter rule, see Book II., Pt. I., Ch. II.

With respect to the former rule, which is not confined to questions of agency, a leading case upon the general principle is *Lord Arlington* v. *Merricke* (*a*), decided by the King's Bench [★ 179] ★ in 1672. An action of debt on a bond having been brought against a defendant, he prayed oyer of the condition of the bond. Lord Arlington, Postmaster General for the time being, had appointed one J. as his deputy at Oxford for the term of six months following, on condition that he would faithfully perform all the duties of the office. One of the deputy's duties was at the end of every month to pay into the General Post Office all moneys received by him in his office. The bond was dated and executed in 1667. Within two or three years of its execution J. received money for which he failed to account, and an action was thereupon brought against the defendant as his surety. Hale, C. J., and the other learned judges, were clearly of opinion that the condition should refer only to the recital by which the defendant was bound for six months. In *Rooke* v. *Lord Kensington* (*b*), the subject was fully considered by Sir W. Page Wood, V.-C. *Jenner* v. *Jenner* (*c*) is a later authority; but the above principle is well established, and has been applied in a variety of cases (*d*).

Power "to transact all business" construed with reference to subject-matter.]—Now let us turn to the more modern cases in which the question had reference to the authority of an agent. In *Hay* v. *Goldsmidt* (*e*), decided by the Court of King's Bench in 1804, the action was brought to recover money received by the defendants upon a bill of exchange. The bill was payable to the plaintiff's testator or his order. The testator had granted to J. and R. a power of attorney authorizing him to ask, demand and receive "all money that might become due to him on any account whatsoever, and to transact all business, and upon non-payment or non-delivery thereof, for him, and in his name, to use all such lawful ways and means for the recovery thereof as he might or could do if he was personally present and did the same." They received the bill above mentioned under this power, and having severally indorsed

(*a*) 2 Wms. Saunders, 411 a.
(*b*) 2 K. & J. 753.
(*c*) L. Rep., 1 Eq. 361.
(*d*) See per Lord Mansfield in Moore *v.* Magrath, 1 Cowp. 9.
(*e*) Referred to in Hogg *v.* Snaith, 1 Taunt. 349.

and arrange all differences and disputes between them [partners] and the Bank of Vincennes, and all persons whatever; to execute and sign their names to any lease, covenant, or conveyance of all or any part of their joint estate, whether real or personal; and to give and receive, discharges, receipts, &c." Held, the agent could not confess judgment; Lagow *v.* Patterson, 1 Black (Ind.), 252. An agent to collect and distribute cannot release without payment; Melvin *v.* Lamar Insurance Co., 80 Ill. 446. Nor can one who holds a note for collection sell it; Smith *v.* Johnson, 71 Mo. 382; see Bassett *v.* Hawk, 114 Pa. St. 502.

it in the name of the testator, discounted it with the defendants, who afterwards received the value from the acceptors. At the trial a verdict was found for the plaintiffs, but a rule was granted for setting aside the verdict and entering a nonsuit, on the ground that J. and R. had authority to indorse and discount the bill. Upon ★ argument, the court held that the power [★ 180] "to transact all business" did not authorize the indorsement, and that inasmuch as the largest powers must be construed with reference to the subject-matter, the words "all business" must be confined to all business necessary for the receipt of money. So in *Hogg* v. *Snaith* (*f*), decided in 1808, where the power of attorney authorized the agent to receive all salary and money, to compound, discharge, give releases, and appoint substitutes, it was held that the power did not authorize the negotiation of bills received in payment, nor the indorsing of them in the agent's own name. It was further held that evidence of an usage at the navy office to pay bills indorsed by the attorney in his own name, and negotiated by him under such a power, could not be received to enlarge the operation of the power.

The above decisions were approved of in *Murray* v. *East India Company* (*g*), decided in 1821, in which it was held that a power of attorney empowering an agent to demand, sue for, recover and receive all moneys, debts and dues, and to give discharges, did not authorize him to indorse bills for his principal.

Similar questions were again raised in *Attwood* v. *Munnings* (*h*), decided in 1827. The defendant, a member of a firm of merchants, on going abroad, granted a power of attorney to A., B., and C. his wife, jointly and severally for him and in his name, and to his use, to sue for and get in moneys and goods, "to indorse, negotiate and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement." By another power of attorney subsequently executed, he gave to his wife C., amongst other powers, authority for him and on his behalf to pay and accept such bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require, and generally to do, negotiate and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein. While he was abroad, A., who was also one of the partners in the same business, and who acted as the defendant's agent, drew four bills of exchange upon the defendant for the purpose of paying creditors of the partnership business. They were accepted by the defendant's wife in his ★ name, and the proceeds applied in payment of the [★ 181] partnership debts. The plaintiffs were indorsees of the bills. The

(*f*) *Supra.*
(*g*) 5 B. & Ald. 204.
(*h*) 7 B. & C. 278.

court decided upon these facts, first, that the right of the indorsee depended upon the authorities given by the attorney; secondly, that the powers applied only to the defendant's individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that A. did not draw the bill in question as agent, but as partner; and, lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purposes for which they were given.[1]

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[1] A power of attorney to collect all demands due A. and to discharge and compound the same, to dispose of A.'s real estate, and to accomplish at discretion a complete adjustment of all of the concerns of A. will not authorize the agent to give a note in A.'s name. Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 494.

An authority to collect or secure a claim will not authorize the agent to purchase the property of the debtor for the principal, because it is not the natural, or usual way to secure a debt. Taylor *v.* Robinson, 14 Cal. 396. Nor can the agent purchase the property of the debtor when his power is to collect or secure a claim by note, bill of sale or mortgage, coupled with the words: "or any way to settle the above bill." Pollock *v.* Cohen, 32 Ohio, St. 514.

A power of attorney to buy and sell real and personal property and to execute and deliver deeds, to transfer the same; to move and institute all necessary suits for the recovery and collection of his demands and to assert and vindicate his rights, and to appear and defend in all suits against him; especially to carry on his saw-mill and buy and sell logs, timber and lumber, and to do all necessary things in and about the same, and in general to make such contracts, for the profitable improvement and use of such property and other means as he possessed, for the enlargement of his estate. It was held that the agent was not authorized to mortgage the real estate of his principal. Wood *v.* Goodridge, 6 Cush. (Mass.) 117. An agent to collect debts and to pay and receive money, cannot bind his principal by negotiable instruments. Hazeltine *v.* Miller, 44 Me. 177.

An agent authorized to bargain and sell lands, cannot grant a license to the purchaser, previous to the conveyance, to enter and cut timber, although such license be given with a *bond fide* intent to effect the sale of the land. Hubbard *v.* Elmer, 7 Wend. 446.

An authority "to attend to the business of the principal generally, or to act for him with reference to all his business" does not authorize him to sell either the real or personal property of the principal, unless such is necessary to conduct the principal's business. Coquillard's Adm. *v.* French, 19 Ind. 274.

Where a power of attorney, relative to real estate, authorizes the agent "to grant, bargain and sell the same, or any part or proportion thereof, for such sum or price, and on such terms as might to him seem meet" the agent has no power to make a conveyance in consideration of love and affection in the principal for the grantee in the conveyance. The conveyance is void. He can sell for a monied consideration. Mott *v.* Smith, 16 Cal. 533. See, also, Wood *v.* McCain, 7 Ala. 800; City Bank of Macon *v.* Kent, 57 Ga. 283; Feldman *v.* Beir, 78 N. Y. 293; Mylius *v.* Copes, 23 Kansas, 617; De Rutte *v.* Muldron, 16 Cal. 505; and Chase *v.* Dana, 44 Ill. 262. Where the rule is laid down that an attorney in fact can only act within the strict letter of his authority, for the purposes and in the manner described, a departure from which will not be sanctioned.

See Lewis *v.* Ramsdale, 55 L. T., N. S. 179, (1886), in which A. gave a power of attorney to B. to manage real estate, recover debts, settle actions, also to "sell and convert into money" personal property, and to execute and per-

This decision of the Court of King's Bench was mentioned with approval in the Court of Common Pleas two years afterwards in the case of *Withington* v. *Herring* (*i*), 1829, where, however, owing to the different facts of the case, a different *ratio decidendi* applied. C. entered into an agreement with the defendants in which he undertook to carry on certain mining speculations for them in America. He was furnished with instructions and a letter of authority to draw on the defendants for 10,000*l.* By a power of attorney, he was authorized "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose." After he had raised the 10,000*l.* under the letter of authority, he obtained 1,500*l.* of the plaintiff in America, and applied the money to the use of the defendants. He did not show the letter of authority to the plaintiff, nor did it appear that the plaintiff knew that money had been previously raised by C. The court was of opinion that the plaintiff was entitled to recover the 1,500*l.* from the defendants as money had and received to their use. The court was of opinion that the agent had an implied authority to raise the money advanced, for the reason apparently that the exercise of authority in raising the money was an act necessary for executing the original authority with effect. This seems to be the true ground of the decision.

Construction of general words.]—The rule was stated by Baron Alderson in a later case (*k*) to the effect that general words must be construed with respect to the antecedent matter which states ★ the purpose for which the letter of attorney was given. [★ 182] Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect.

SECT. 2.—*Where the Authority is ambiguous.*

Interpretation of ambiguous authority.]—When the instructions given to an agent are clear and defined, his duty is to observe them faithfully. He will not be allowed to violate them in any way particular, provided they may be lawfully carried out. On the other

(*i*) 5 Bing. 442.
(*k*) Esdaile v. La Nauze (1835), 1 Y. & C. 394.

form any contract, agreement, deed, writing, or anything that might be in B.'s opinion necessary or proper for effectuating the purposes aforesaid, or any of them; and "for all or any of the purposes of those presents to use A.'s name and generally to do any other act whatsoever which in B.'s opinion ought to be done in or about A.'s concerns as fully as if A. were present and did the same, his desire being that all matters respecting the same should be under the full management and direction of B. and it was *held* that the general words were limited by the special purpose of the power of attorney, and did not authorize a mortgage of his personal property.

hand, if the instructions are given in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the instructions or orders to be read in the other sense of which they are equally capable. It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambigious terms (*l*).[1]

General instructions to insure.]—In one of the earliest reported cases, *Moore* v. *Mourgue* (*m*), decided in 1776, the action was for negligence in not insuring a cargo of fruit according to the plaintiff's directions. At the trial it did not appear that the plaintiff had given any particular directions how or with whom to insure. The instruction was a general one to insure the cargo. The defendant insured with a company which always in policies on fruit inserted the clause "free from particular average." After insurance a partial loss occurred. The proceeds of the damaged part of the cargo were insufficient to pay the salvage claim. There were apparently two offices in which the exception was never put in policies. "To maintain this action," said Lord Mansfield, "the defendant must be guilty either of a breach of orders, gross negligence, or fraud. . . . In delivering their verdict they (the jury) say they did not think the defendant guilty of gross negligence, or that he acted *malâ fide*. The court, therefore, will not say so. . . . He [★ 183] ★ (the plaintiff) gives no directions at all. Therefore he left it to the discretion of his correspondent, who; if he meant no fraud, was at liberty to elect between the underwriters. . . . If upon all the circumstances the jury had found for the plaintiff, it might have been a cast whether the court would have granted a new trial. *A fortiori* in a hard action, where, as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bonâ fide*, and where the plaintiff has himself been guilty of the first omission in giving no directions at all, there seems to be no ground for the court to interfere against the defendant." The other judges concurred, and a rule for a new trial was discharged, The principle deducible from this case is that where the instructions are ambiguous, an agent will be protected if he acts in a way warranted by one of the constructions to which the instructions are susceptible, provided he is guilty of neither *mala fides* nor gross negligence.

Ambiguous instructions as to terms of sale, or purchase]—The Court of Common Pleas decided in 1851 a case in which a similar

(*l*) per Lord Chelmsford in Ireland *v.* Livingstone, L. R., 5 H. L. 416.
(*m*) 2 Cowp. 479.

[1] Sometimes a wish expressed by a consignor to a factor may amount to a positive command. Brown *v.* McGran, 14 Peters 480; Wilson *v.* Wilson, 26 Pa. St. 393; Mann *v.* Lewis, 117 Mass. 293; Foster *v.* Rockwell, 104 Mass. 167.

principle was involved (*n*). The defendant was employed by the plaintiff to sell for him a quantity of coal at such a price as would realize "not less than 15*s.* per ton, net cash, less your commission for such sale." The defendant sold one hundred tons of the coal at 15*s.* 6*d.* per ton at two months' credit. The plaintiff then sued *in assumpsit*, averring in his declaration that the defendant promised the plaintiff that he would not sell the coals otherwise than for ready money. At the trial before Chief Justice Jervis, the plaintiff was nonsuited, the learned judge being of opinion that the instructions did not bear the construction put upon them in the declaration. It was customary in the coal trade to sell coals at a credit of two months, except on the wharf. Leave was reserved to move to enter a verdict for the plaintiff, if the court should be of opinion that the evidence sustained the declaration. The rule was discharged by the full court. "The letter of instructions," said Chief Justice Jervis, "will admit of at least three significations. It may mean sell for cash down, 15*s.*, or at such price as will eventually realize 15*s.*, or a *del credere* (*o*) . . . It is the plaintiff's duty to make out that the construction which he has put upon it in declaring is the true one; and this he has failed to ★ do if the matter be [★ 184] at all doubtful." This case was decided upon more technical grounds than the former; there is, nevertheless, a similarity in the *ratio decidendi*.

The decisions of the Court of Queen's Bench, the Exchequer Chamber, and the House of Lords in *Ireland* v. *Livingstone* (*p*), the final decision being given in 1872, should be carefully studied. The defendant wrote to the plaintiffs, who were commission agents at Mauritius, "Should the beet crop prove less than usual there may be a good chance of something being made by importing cane sugar, at about the limit I am going to give you as a maximum, say 26*s.* 9*d.*, for Nos. 10 to 12, and you may ship me 500 tons, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but if that is not compassable you may ship to either Liverpool or London." According to the ordinary course of purchasing sugars in the Mauritius, it was not usual, or even possible, to buy the whole of the sugar at once. The usage there was to make shipments of less than the whole quantity ordered. The plaintiffs accordingly purchased about 400 tons, being unable to get any more within the defendant's limit. They were shipped about the end of September. The prices of sugar fell in England in the meantime, and the defendant wrote a countermand of his order, which was received by the plaintiffs on the 20th October. The defendant refused to accept the 400 tons when they arrived in England on the ground that his

(*n*) Boden *v.* French, 10 C. B. 886.
(*o*) *Ibid.*, p. 887
(*p*) L. Rep., 2 Q. B., 99; 5 *ib.* 516; L. R., 5 H. L. 395.

order had not been complied with. The Court of Queen's Bench, consisting of Chief Justice Cockburn, Justices Mellor and Shee, decided that the defendant was bound to accept and pay for the 400 tons. Nothing turned upon any ambiguity on the instructions. The grounds upon which the court decided were simply that a discretion was given to the plaintiffs by the words "fifty tons more or less," and that the defendant must be taken to have given the order with reference to the circumstances of the Mauritius market. On appeal to the Court of Exchequer Chamber, Baron Cleasby and Mr. Justice Montague Smith were of opinion that the judgment of the Queen's Bench should be affirmed, whilst the majority, Chief Baron Kelly, Barons Martin and Channel, and Mr. Justice [★ 185] ★ Keating, reversed that judgment on the ground that the instructions gave no discretion; that the order being unambiguous for a single cargo of 500 tons in a single ship, no question could be raised respecting the custom at the Mauritius. On behalf of the respondent it was contended, on the authority of *Bayliffe* v. *Butterworth* (*q*), that inasmuch as the order was not so unambiguous as to exclude the custom, the custom of the market at Mauritius must be referred to, to explain it. This was the opinion of Mr. Justice Montague Smith, one of the minority. In the House of Lords this opinion prevailed, and it was held by the Lords present, namely, Lords Chelmsford, Westbury and Colonsay, to be sufficient for the decision of the case. The judgment of the Court of Exchequer Chamber was reversed. After hearing the opinion of the judges the learned lords decided that the ambiguity of the order justified the mode of executing it. The case was thus brought within the operation of a well-established rule.

Ireland *v.* Livingstone—*Diversity of opinion among the judges.*] —The difference of opinion upon this question was remarkable. In the Queen's Bench, Chief Justice Cockburn, Justices Mellor and Shee were of opinion that the words "fifty tons more or less" gave a discretion, and that they had reference to the advantage of getting a suitable vessel. In the Exchequer Chamber this was substantially the opinion of Baron Cleasby, Mr. Justice Montague Smith, Chief Baron Kelly. Barons Channell and Martin, and Mr. Justice Keating, on the other hand, thought that the authority pointed to a single shipment of one cargo and by one vessel. The judges having been summoned to the House of Lords, Barons Cleasby and Martin supported their former opinions. Justices Byles, Blackburn and Hannen supported the judgment of the Queen's Bench.

(*q*) 1 Ex. 425; 17 L. J., Ex. 78.

SECT. 3.—*Where the authority is conferred by Informal Writing or arises by Implication.*

The rules under this head may be briefly summarized.

(a.) A written instrument will be so construed as to give authority to do only such acts as are within the scope of the particular matter to which the instrument refers (*r*).[1]

★(b.) Where orders and instructions are free from am- [★186] biguity, they will be construed according to their obvious meaning. As to the rules where they are not, see Sect. 2 of this chapter. The construction of mercantile instruments and instructions may be guided by the usages of trade; and for that purpose the evidence of persons conversant with mercantile affairs is received (*s*).

(c.) With reference to the construction of an authority which arises by implication, see Book II., Part I., Chap. II.

(*r*) Story's Agency, s. 68. See Sect. 1 of this chapter.
(*s*) Paley, by Lloyd, 198; Story, s. 75.

[1] As where an agent of a stage company, authorized to obtain surgical aid for a passenger injured by the upsetting of the coach, is not therefore authorized to employ a physician to attend to one who has acted as coachman, and who has also been injured by the same accident without the consent and knowledge of the company. Shriver *v.* Stevens, 12 Pa. St. 258; Gardner *v.* Boston & Maine R. R., 70 Me. 181; Taylor *v.* Chicago & N. West. R. R., 74 Ill. 86; Wakefield *v.* South Boston R. R., 117 Mass. 544; Steinback *v.* Bank of Virginia, 11 Grattan (Va.), 269.

[★ 187]

★CHAPTER VI.

ADMISSIONS AND DECLARATIONS BY AGENTS.

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Circumstances under which the admissions of an agent bind his principal.]—As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent made a certain statement. So with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. Nevertheless the admission of the agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it: but it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct, or his agreement, merely be- [★ 188] cause ★ that person has been an agent of his (*b*). An agent can act only within the scope of his authority; hence declarations or admissions made by him as to a particular fact are not admissible as evidence against the principal, unless they fall within the nature of the agent's employment as agent; unless, for instance, they form part of the contract which he has entered into and is em-

(*b*) *Per* Sir William Grant, M. R., Fairlie *v.* Hastings, 10 Ves. 123, 126.

ployed to negotiate on behalf of the principal (*c*)[1]. Hence, what is said by an agent respecting a contract or other matter in the course of his employment, is good evidence to affect the principal, but not if it is said on another occasion (*d*). Hence, too, an admission by the servant of a company as to the ferocious habits of a dog which had bitten the plaintiff, was rejected in the absence of proof that the servant had the care of the animal, or control of the place where the dog was kept (*e*).

The old rule—Agent should be called to prove admission.]—The ruling in two old cases (*f*), is calculated to throw some difficulty upon the subject of admissions and declarations. The proposition which may be inferred from these decisions is that where an agent can himself be called, evidence of his admissions will not be received as evidence against his principal, unless the principal's acquiescence in such admissions may be reasonably inferred. In *Maestars* v. *Abram* the agent was in the box as a witness, and it was urged on behalf of the defendant that a letter written by the agent to the principal should not be produced, as the agent was there in person. Lord Kenyon ruled that the agent's statement of what he had done on account of the defendant was admissible; but that it should be learned from himself, and not by the letter. To the same effect Mr. Justice Chambre ruled (*g*) that an affidavit of an agent cannot be used to prove a fact against his principal when the agent himself can be called; but, where the principal has used an affidavit of the agent in an application to the court in which a particular fact is stated, the affidavit of the agent may be used as evidence of that fact. In neither of these cases was there any necessity to apply the first part of the above proposition. In the one case (*h*), the letter was not contemporary with the ★trans- [★ 189] action to which it referred; in the other the agent's affidavit was admitted because the principal had acquiesced in it. The difficulty here referred to has been touched upon by Sir W. Grant, M. R. (*i*): "If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, and not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the

(*c*) Betham *v.* Benson, Gow. 45.
(*d*) Peto *v.* Hague, 5 Esp. 134.
(*e*) Stiles *v.* The Cardiff Steam Navigation Company, 33 L. J., Q. B. 310.
(*f*) Maestars *v.* Abram, 1 Esp. 374, and Johnson *v.* Ward, 6 Esp. 47.
(*g*) Johnson *v.* Ward, *supra*.
(*h*) Maestars *v.* Abram, *supra*.
(*i*) Fairlie *v.* Hastings, 10 Ves. 127.

[1] An agent's authority to act cannot be proved by his admissions. McDonough *v.* Heyman, 38 Mich. 334; Bacon *v.* Johnson, 56 Mich. 182; Winch *v.* Baldwin, 28 N. W. Rep. 62; Wood Mowing Co. *v.* Crow, 30 N. W. Rep. 609. See, also, Rhodes *v.* Towry, 54 Ala. 4; Baldwin *v.* Ashby, 54 Ala. 82; Grimshaw *v.* Paul, 76 Ill. 164; Rinesmith *v.* People's Fr. R. R., 90 Pa. St. 262; Demerritt *v.* Meserve, 39 N. H. 521.

principal; holding that the agent himself must be examined. If the agreement was contained in the letter, I should have thought it sufficient to have proved that letter was written by the agent, but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." This doctrine was discussed incidentally in *Bauerman* v. *Radenius* (*k*), where upon reference to the case of *Biggs* v. *Lawrence* (*l*), in which Mr. Justice Buller held that a receipt given by an agent for goods directed to be delivered to him was admissible against the principal, it was objected that Lord Kenyon had frequently ruled the contrary since at Nisi Pruis, and this was not denied.

Summary.]—The result of the cases appears to be that if it is shown that an admission has been made by an agent acting in a matter within the scope of his authority, and that it is a part of the *res gestæ*, and does not relate to bygone transactions, then such admission is receivable in evidence against the principal, and the agent himself need not be called.

Bygone transactions—Admissions as to.]—It is not within the scope of an agent's authority to make admissions with reference to bygone transactions. Hence, in an action against a railway company for not conveying cattle to market in a reasonable time, evidence of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and one of the defendants' servants with respect to negligence was not admitted (*m*).[1] So admisaions by the under-sheriff not accompanying an act done in his official character, are not admissible against the sheriff (*n*). Again, a letter by an agent was held not to be admissible as evidence of a pre-existing agreement, though it may be evidence of [★ 190] an agreement contained in ★ that letter (*o*). This is probably the true ground of the decision in *Maestars* v. *Abram* (*p*).

(*k*) 7 T. R. 663.
(*l*) 3 T. R. 454.
(*m*) Great Western Railway Company *v.* Willis, 18 C. B., N. S. 748.
(*n*) Snowball *v.* Goodriche, 1 N. & M. 234.
(*o*) Fairlie *v.* Hastings, 10 Ves. 128; Kahl *v.* Jansen, 4 Taunt. 565.
(*p*) 1 Esp. 375.

[1] Huntingdon, &c. R. R. Co. *v.* Decker, 82 Pa. 119. When the baggage of a passenger has been destroyed by fire, subsequent declarations of one of the brakemen on the train, as to the cause of the fire, will not be admissible, as against the railroad company. Michigan Cent. R. R. *v.* Carrow, 73 Ill. 348. An employé of a railroad was injured while attempting to couple two cars. A declaration by a co-employé, made a few minutes after the accident to the effect that it was known that the car was out of repair, and that the company intended fixing it, was not admissible, on the ground that the co-employé was a mere spectator and was not present at the accident in the performance of any duty. Verry *v.* The B. & C. R. R., 47 Iowa, 549.

An admission of an agent which is not made at the time of doing an act in the exercise of his authority, nor explanatory of any contemporaneous act in the execution of his agency, is not admissible as against the principal, or as against his sureties. Memphis & Charleston R. R. *v.* Maples, 63 Ala. 601; Johnson *v.* Thompson, 23 Hun. (N. Y.) 90.

Hearsay evidence—Foreign agent.]—Admissions which consist of hearsay evidence are not receivable against the principal. Thus, the letters of an agent of an assured in a foreign country, stating the contents of letters from another agent of the assured, were not admitted as evidence against the principal (*q*). The rules respecting the admissibility of the agent's declarations are the same whether the agent resides abroad or not (*r*).

Agent's letters.]—Letters of an agent to his principal, in which the former is rendering an account of the transaction he has performed for him, are not admissible against the principal (*s*).

Principal and surety.]—What a principal has said respecting goods sold to him is not evidence to charge the surety, so as in an action against the latter to dispense with proof of the delivery of the goods (*t*).

Co-trespassers—Admission by one.]—Evidence of an admission made by one of several defendants in trespass will not establish the others to be co-trespassers; but if they are established to be co-trespassers by other competent evidence, the declarations of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object (*u*).

Statements made by station-master.]—The case of *The Kirkstall Brewery Company* v. *The Furness Railway Company* (*x*), which was decided in 1874, affords a good illustration of the rules that regulate the admission of statements made by agent. An action was brought for the loss of a parcel containing money. The defendants pleaded the Carriers Act; and plaintiffs replied that the parcel was lost by the felonious act of one of the company's servants. At the trial the evidence showed that the parcel was sent on the 27th of July, by the defendant's railway, addressed to the plaintiffs' clerk at Ulverston; that the parcel was not delivered, and on the same day a porter at the Ulverston Station disappeared. The superintendent of police at Ulverston ★ stated that the [★ 191] station-master gave information that the porter had absconded; that a parcel of money was missing, and that the porter was suspected of the theft. He wished the superintendent to make inquiries. The court decided that this evidence was rightly admitted.

"There is no principle," said Cockburn, C. J., "on which this would not be admissible evidence. Then, if P. (the station-master) was the agent of the defendants, and if it was within the scope of his duty and authority as agent to do what the principal, if on the spot, would have done, what he says whilst he is so acting is

(*q*) Kahl *v.* Jansen, 4 Taunt. 565.
(*r*) *Per* Chief Justice Mansfield, Longhorn *v.* Allnutt, 4 Taunt. 517.
(*s*) *Ibid.*
(*t*) Evans *v.* Beattie, 5 Esp. 26.
(*u*) R. *v.* Hardwick. 11 East, 578, *per* Lord Ellenborough.
(*x*) L. R., 9 Q. B. 468; 43 L. J., Q. B. 142.

equally admissible as if said by the principal himself. Now it is impossible to say that the man who has the sole management of the station has not authority to cause a person to be apprehended whom he has reasonable ground to suspect has stolen a parcel from the station."

Statements by interpreters.]—If the statements of the agent are admissible, the statements of the agent's interpreter, acting as such in the agent's presence, are admissible without calling the interpreter; and it must be assumed as against the principal that the interpreter interpreted faithfully (*y*). The admissibility of this evidence was placed by Mr. Justice Wightman (*y*) on the ground that when a communication is to take place in a foreign country, and both parties know that an interpreter will be wanted, it must be taken that both parties agree upon the interpreter who professes to interpret.

Declarations of directors and their secretary.]—The admission or declaration of the directors of a company made in the discharge of their duty are admissible against the company. Hence, when the directors of a joint-stock company, with a view to raise its shares in the market, represent the concern as prosperous, and offer money to the shareholders to buy further shares, the House of Lords, in an action by the company to recover the money advanced, held that the company could not succeed (*z*). So a letter written by the secretary of a company, by order of the acting directors, stating the number of shares held by A., was admitted on behalf of A.'s executors in proceedings against them, upon the winding-up of the company, and after the distribution of the assets (*a*).

[★ 192] ★ *There must be proof of the agency.*]—Admissions or declarations of an agent cannot, of course, be received if there is no sufficient proof of agency.[1] Thus, when a policy was signed by A., professing to act on behalf of such agent, and a witness was called to prove the agent's handwriting, and swore that he had often seen him sign policies for the defendant: the witness had seen no general power of attorney; nor did he knew whether the defendant had given the agent authority to sign the policy in question; nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed: Lord Ellenborough accordingly ruled that the proof of agency was not enough (*b*).

(*y*) Reid *v.* Hoskins, 26 L. J., Q. B. 5.
(*z*) National Exchange Company of Glasgow *v.* Drew, 2 Macq. 103.
(*a*) Meux's Executors' case, 2 D., M. & G. 522.
(*b*) Courteen *v.* Touse, 1 Camp. 43 n.; but see Lord Kenyon's decision in the earlier case of Neal *v.* Irving, 1 Esp. 61.

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[1] Burlingame *v.* Foster, 128 Mass. 125; Lycoming Insurance Co. *v.* Ward, 90 Ill. 545; Whitney *v.* Lake, 91 Pa. 349; Howe Machine Co. *v.* Clark, 15 Kan. 492; Bowker *v.* Delong, 141 Mass. 315; Brigham *v.* Peters, 1 Gray, 139.

So one promoter of the company is not as such the agent of the others (*c*), though this presumption may of course be rebutted (*d*).

Pawnbroker's assistant—statements by—General tendency of the courts to limit this class of evidence.]—The tendency of the courts is to limit the admissibility of evidence of this nature. The reasons upon which they so act have been forcibly summed up by the Court of Common Pleas (*e*), in a case in which it was decided that the statement of a pawnbroker's assistant with reference to a private loan in which he was not concerned as agent was rejected. "It is dangerous," said Chief Justice Tindal, "to open the door to declarations of agents, beyond what cases have already done. The declaration itself is evidence against the principal, not given upon oath; it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation or any question put to the agent; and it is brought before the court and a jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original bearer, and again to further suspicion from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it."

Admission by waywarden.]—An admission by a waywarden ★ that a road is a highway which the parish is liable to [★ 193] repair is binding upon the highway board (*f*).

Declaration by solicitor's clerk.]—In an action on an attorney's bill for prosecuting an action, Abbott, C. J., admitted evidence for the defence of a declaration, made by the plaintiff's clerk when he attended the master to tax the costs in the former suit (*g*), that the plaintiff undertook to conduct the cause gratis.

(*c*) Reynell *v.* Lewis, 15 M. & W. 517.
(*d*) *Ibid.*; Collingwood *v.* Berkeley, 15 C. B., N. S. 145; Lindley on Partnership, 253.
(*e*) Garth *v.* Howard, 8 Bing. 451.
(*f*) Loughborough Highway Board *v.* Curzon, 55 L. T. 50.
(*g*) Ashford *v.* Price, 3 Stra. 185.

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★ CHAPTER VII.

THE DOCTRINE OF CONSTRUCTIVE NOTICE.

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Notice to agent is notice to principal, when.]—Lord Hardwicke stated, in the year 1746, that it was settled law that notice to a person "who was employed in the thing by another person, or in another business and at another time," is no notice to his principal who employed him afterwards, basing the reason of the rule on the ground that it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be most dangerous to employ (*a*). So to the same effect Lord Eldon observed, in *Hiern* v. *Mill* (*b*), which was decided in 1806, "notice to an agent is notice to the principal, if the agent comes to the knowledge of the fact while he is concerned for the principal, and in the course of the very transaction which becomes the subject of the suit." [1] So Vice-Chancellor Leach, in *Mountford* v. *Scott* (*c*), decided in 1818, ob-

(*a*) Worsley *v.* Earl of Scarborough, 3 Atk. 392; and see Warrick *v.* Warrick, *ibid.* 294.

(*b*) 13 Ves. 120.

(*c*) 3 Mad. 34.

[1] Mobile & C. R. R. *v.* Thomas, 42 Ala. 672; Farmer *v.* Willard, 71 N. C. 284; Singer Mfg. Co. *v.* Holdfoot, 86 Ill. 455; Whitney *v.* Burr, 115 Ill. 289; Covey *v.* Hannibal, &c. R. R., 86 Mo. 635; Gans *v.* St. Paul, &c. Ins. Co., 43 Wis. 108; Ward *v.* Warren, 82 N. Y. 265; Cole *v.* Ins Co., 99 N. Y. 36; Taylor *v.* Young, 56 Mich. 285; Rogers *v.* Palmer, 102, U. S. 263; Suit *v.* Woodhall, 113 Mass. 391; Philadelphia *v.* Lockhart. 73 Pa. St. 211. Where the Legislature acts as agent of the State, notice to the individual members thereof, is not notice to the Legislature. The notice to be binding must be given to one of the legislative branches in organized session. Sooy *v.* State of New Jersey, 41 N. J. L. 394.

served that although notice to an agent is notice to a principal, the latter cannot stand in the place of the principal until the relation of principal and agent is constituted; and as ★ to all the [★ 195] information which he has previously acquired, the principal is a mere stranger. On appeal to Lord Eldon (*d*), the case was decided upon a point which rendered the question of notice immaterial, namely, that a lien cannot be claimed where the terms upon which deeds are received are inconsistent with such lien. The principle which ultimately prevailed appears to have been first mentioned in the year 1706, in *Brotherton* v. *Hatt* (*e*); but that case is too loosely reported to be of practical use. In *Mountford* v. *Scott* (*f*), Lord Eldon, in commenting upon Sir John Leach's remarks, observed, "The Vice-Chancellor in this case appears to have proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far, or to say that if an attorney has notice of a transaction in the morning he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." This statement was quoted with approval by Vice-Chancellor Sir James Wigram (*g*).

Notice to solicitor, when binding on a client.]—The question was definitely raised in 1836 in a case heard by Lord Langdale (*h*), and it was decided that where one transaction was closely followed by and connected with another, or where it was clear, as in the case before the court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction. This principal, however, has not been adopted as a statement of the law.

Statement of the law by Wigram, V.-C., in Fuller *v.* Bennett.]—In *Perkins* v. *Bradley* (*i*), a solicitor, who prepared a deed of charge on behalf of a mortgagor and mortgagee, was held to have notice of that incumbrance on the occasion of taking a subsequent mortgage of the same property to himself. In a later case (*k*), decided in 1843, Vice-Chancellor Wigram considered ★ at [★ 196] length the authorities bearing upon the subject, and expressed an opinion that Lord Eldon did not by his dicta in *Mountford* v.

(*d*) 1 Turn. & Russ. 274.
(*e*) 2 Vern. 574.
(*f*) 1 Turn. & Russ. 274.
(*g*) Perkins v. Bradley, 1 Ha. 219.
(*h*) Hargreaves v. Rothwell, 1 Keen, 154.
(*i*) *Supra.*
(*k*) Fuller v. Bennett, 2 Ha. 394.

Scott (*l*) intend to shake the general doctrine which he, as well as Lord Hardwicke and other judges, had so often insisted upon (*m*). The facts of *Fuller* v. *Bennett* are shortly these:—During negotiations, in which A. agreed to sell and B. to buy an estate, A. agreed to mortgage the estate to C. for an old debt, notice of the agreement being given to B.'s solicitors. All negotiations for the sale remained then in abeyance for five years, at the end of which time A. died; B. then bought the estate at a lower price from A.'s devisee, and mortgaged it to D. The same solicitors were employed for B. and D. throughout the whole transaction. It was urged in support of C.'s claim to a lien upon the estate to the amount agreed to be secured by the mortgage, that where one of two matters transacted by the same solicitor follows so close upon the other that the earlier transaction cannot have been out of the mind of the solicitor when engaged in the later, there is no ground for restricting the notice to the client to the second transaction only; on the other hand, it was urged that the knowledge which the solicitor has must be acquired after and during the retainer, or it will not affect the client. The vice-chancellor refused to accede to either proposition in its full extent, but he held that, under the circumstances of the case, B. and D. had constructive notice of the agreement with C. The conclusions to be deduced from his judgment are:—

(1.) The question is not simply one of memory on the part of the solicitor.

(2). The rule that notice to the solicitor will not bind the client, unless it is in the same transaction, or during the time of the solicitor's employment in that transaction, is a rule *positivi juris*, but it certainly has no application when the same solicitor is employed by both parties, the vendor and purchaser.

(3.) No solution, however, is offered of the abstract question whether a purchaser, who for the first time employs a solicitor (not being also the solicitor of the vendor), can be affected with constructive notice of anything known [★ 197] ★ to the solicitor, save that of which the solicitor acquires notice after his retainer, and during his employment by the purchaser.[1]

(*l*) *Supra.*

(*m*) Warrick *v.* Warrick, 3 Atk. 294; Steed *v.* Whitaker, Bernard. Ch. Rep. 220; Hiern *v.* Mill, 13 Ves. 120; Kennedy *v.* Green; 3 My. & K. 699.

[1] The rule that notice to the agent is notice to the principal extends beyond the knowledge acquired during the continuance of the agency and includes that possessed by him so shortly prior to his employment, as necessary to give rise to the inference that it remained fixed in his memory when the employment began. Chonteau *v.* Allen, 70 Mo. 290; Lebanon Saving Bank *v.* Hollenbeck, 29 Minn. 322; see, also, Flower *v.* Ellwood, 66 Ill. 438.

A policy of insurance contained this condition: "Any interest in property insured and not absolute, or that is less than a perfect title, or if a building is insured that is on leased grounds, the same must be specifically represented

A solicitor is not an agent to receive notice in respect of mercantile business (*n*).

Where there is a difference between an agent's apparent and his real authority, the question of notice is of importance.

Sale by factor—Notice of agency.]—A general rule, as stated by Lord Chief Justice Wilde (*o*), is that where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another.

In *Fish* v. *Kimpton* (*p*) decided by the Court of Common Pleas in 1849, the jury found that the defendant bought goods with the knowledge that the sellers were merely factors in the sale, and the court held that if A. buys goods of B. knowing that B. is selling them as factor, he cannot, in an action by the principal for the price, set off a debt due to him from B., although A. made the purchase *bonâ fide*.

The Court of Common Pleas decided the case of *Dresser* v. *Norwood* (*q*), in the year 1863, on the ground that a distinction existed between the doctrine of courts of law and courts of equity, and held that at law a principal is only affected with notice of those facts which come to the knowledge of the agent in the course of his employment; and not with knowledge acquired by him previously. In that case an agent of the defendant bought timber of the agent of the plaintiff, who sold in his own name. The former agent knew that the latter was an agent in the transaction, but the defendant did not, and the court held that the defendants could not be affected with the knowledge of their agent, inasmuch as his knowledge was acquired in the course of another employment. This decision was reversed in the Exchequer Chamber, where Chief Baron Pollock said, "We think that in a commercial transaction of ★ this description . . . the knowledge of the agent, [★ 198] however, acquired, is the knowledge of the principal," and the court explained that the judgment was not to be understood as admitting that the case would have been different if the factor had

(*n*) Tate *v.* Hyslop, 15 Q. B. D. 368; 54 L. J., Q. B. 592; 53 L. T. 581.
(*o*) Fish *v.* Kimpton, 7 C. B. 687.
(*p*) *Supra.*
(*q*) 14 C. B., N. S. 574; in error, 17 *ibid.* 466.

to the company, and expressed in this policy, in writing, otherwise the insurance shall be void. The property insured was on leased ground, but this fact was not stated in the policy. It was shown that prior to issuing the policy the agent of the company knew such to be the case. The court held that such knowledge on the part of the agent was notice to the principal. Van Schoick *v.* Niagara Fire Ins. Co., 68 N. Y. 434.

been ignorant that the knowledge of the fact that the buyer's agent was aware that he was only a factor was present to the mind of the buyer's agent, provided it really was so present.

In a case decided by Lord Westbury, C., in 1863 (*r*), there is a *dictum* to the effect that in order to affect a principal with constructive notice of facts within the knowledge of the agent, the knowledge of the agent should be derived from the same transaction. To the same effect are the remarks of Vice-Chancellor Kindersley in *Boursot* v. *Savage* (*s*). But neither of those cases limit the decision in *Fuller* v. *Bennett* (*t*).

The doctrine of constructive notice, it has been said, ought not to be extended, but ought to be reduced within clear and definite principals; and in order to affect a principal with such notice of facts within the knowledge of an agent it is necessary that the knowledge must be of facts which are material to that transaction, and which it was the duty of the agent to communicate (*u*). And if a solicitor is employed to do a more ministerial act, such as the procuring the execution of a deed, that fact does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor (*x*). Hence the transferee of a mortgage is not affected by the knowledge of the solicitor (who acted for him in the transfer) of an incumbrance subsequent to the original mortgage so as to prevent him from making further advances. Such knowledge is not material to the transfer (*y*). Hence, too, where W., wishing to take a transfer of a mortgage, employed A. and B. as his solicitors to investigate the title and conduct the negotiations, and C., the solicitor to the mortgagors, was employed to procure the execution by W. of the deeds of transfer, C. being aware of a judgment debt registered against the mortgagors, it was held (1) that the employment of the latter did not [★ 199] affect W. with notice of the debt; (2) that, even if he ★ had been W.'s agent, the knowledge of the debt not being material to the business for which he was employed, it could not have been C.'s duty to communicate it to W. W. was accordingly held entitled to tack further advances (*z*). The grounds upon which the doctrine rests have been differently stated. Thus it has been said in the case of a solicitor that the probability is so strong that he will tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him. Vice-Chancellor Kindersley stated the principle to be that a solicitor is an *alter ego;* he is an-

(*r*) Wyllie *v.* Pollen, 32 L. J., Ch. 782.
(*s*) L. Rep., 2 Eq. 134, 142.
(*t*) 2 Ha. 394.
(*u*) See per Lord Westbury, Wyllie *v.* Pollen, 32 L. J., Ch. 782; and per Lord Lyndhurst, Jones *v.* Smith, 1 Ph. 244; 12 L. J., Ch. 381; Williams *v.* Williams, 44 L. T. 573.
(*x*) *Ibid.*
(*y*) Wyllie *v.* Pollen, *supra.*
(*z*) *Ibid.*

other self; his client stands in precisely the same position as he does in the transaction, and therefore his knowledge is his client's knowledge (*a*).

How far a purchaser is affected with notice.]—When a person has actual notice of any matter of fact, there can be no danger of doing injustice, if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had actual notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it was sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question (*b*). The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence (*b*). Thus, the imputation of culpable negligence cannot be fixed on a purchaser, merely because it did not occur to him or his advisers to inquire whether a transaction, legally valid, and under which there had been long enjoyment, *e. g.*, for thirty-three years; might not have been so conducted in its origin as to have given to third persons equitable rights, of which there was no trace on the face of the abstract (*b*).

Summary.]—The following principles appear to be deducible from the cases:—

(1.) As to knowledge acquired by an agent during his employment as agent. It is well settled, and is universally true, that a principal is affected with ★ con- [★ 200] structive notice of all such knowledge (*c*), provided the knowledge is of facts which are material to the transaction in which the agent is employed, and which it was the duty of the agent to communicate (*d*).

(2.) As to knowledge acquired by an agent otherwise than in the business for which he was employed. In commercial transactions the knowledge of the agent, however acquired, is the knowledge of the principal (*e*). Where the same solicitor is employed by a vendor and purchaser the latter will be affected with constructive notice of the knowledge possessed by the solicitor, although the knowledge was acquired before the retainer by the purchaser (*f*).

(*a*) Boursot *v.* Savage, L. Rep., 2 Eq. 142.
(*b*) *Per* Lord Cranworth, Ware *v.* Lord Egmont, 4 De G., M. & G. 473.
(*c*) Fuller *v.* Bennett, *supra*, and cases there quoted; Wyllie *v.* Pollen, *supra;* Boursot *v.* Savage, *supra.*
(*d*) Wyllie *v.* Pollen, *supra*; Jones *v.* Smith, 1 Ph. 244.
(*e*) Dresser *v.* Norwood, 14 C. B., N. S. 574; in error, 17 *ibid.* 466.
(*f*) Fuller *v.* Bennett, 2 Ha. 394.

It is assumed, however, that in both these cases the knowledge acquired must be material to the transaction for which the solicitor or other agent is employed.

(3.) When it is sought to fix a purchaser with constructive notice, the question is whether the not obtaining the knowledge was an act of culpable negligence on the part of his agent, and not whether the agent had the means of obtaining that knowledge (*g*).

(4.) The application of the equitable doctrine of constructive notice to mercantile transactions is not encouraged (*h*).

(5.) Though the facts may not be sufficient to fix the agent with notice, *e. g.*, of a settlement, they may be sufficient to render him liable for negligence (*i*).

(*g*) Ware *v.* Lord Egmont, 4 De G., M. & G. 460.
(*h*) Kaltenbach *v.* Lewis, 24 Ch. D. 54; 51 L. J. Ch. 881; 48 L. T. 846.
(*i*) Williams *v.* Williams, 17 Ch. D. 437; 44 L. T. 573.

★Book II.—Part II. [★ 201]

Of the Execution of the Authority.

CHAPTER I.

OF THE EXECUTION OF THE AUTHORITY GENERALLY.

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Twofold inquiry as to whether agents bind principal.]—In considering whether the contract of an agent is binding upon his principal, a twofold inquiry arises. The first concerns the form in which the contract is executed—Is it such as is binding upon the principal? The second relates to the authority of the agent—Has he authority, and, if so, how has he observed it? By pursuing the latter inquiry it will be seen that an agent may profess to act on behalf of a principal, and in so doing he may either act altogether without authority, or, having an authority, he may execute it more or less completely. In short—

(a) He may execute an authority strictly, or with only a circumstantial variance (*a*); or

(b) He may act entirely without authority; or

(c) Having authority, he may do something in excess in executing his authority, or he may do less than his authority justifies.

★ *General rule as to the execution of an authority.*]—If [★ 202] an agent strictly observes his authority, it will depend upon the form and construction of the contract into which he enters, whether

(*a*) Com. Dig. "Attorney," c. 15.

his act will bind his principal and not himself.[1] Although an act varying in substance from the authority is void so far as the principal (*b*), yet there are a number of cases in which an authority will be deemed to be properly executed though it is not strictly pursued. Thus, if executors have authority to sell land, and one of them refuse, the others may sell (*c*); or if one dies (*d*). So, if one devises to A., B., and C. in fee for sale, and makes them executors, if A. refuses, B. and C. may sell (*e*). It is sufficient if the words and intent of the authority are generally pursued; as if a man devise land to A. for life, and afterwards to be sold by his executors generally; if one dies before A., the rest may sell (*f*). So, too, if the agent does all that the law requires, the authority is well executed; as, for instance, if a man has an authority to enter into land, if he comes as near as he can for doubt of death or bodily hurt, and makes claim, it is sufficient (*g*). As to the rights of surviving executors, see the Conveyancing Act, 1881, s. 38.

Circumstantial variance in the execution not material.]—The correct principle is undoubtedly that laid down by Chief Justice Holt, who delivered the opinion of the court in *Parker* v. *Kett* (*h*), 1701, where it is laid down that a circumstantial variation in the execution of an authority is not material. "Authorities by letter of attorney," said his lordship, "are either general or special; thus a

(*b*) Com. Dig. "Attorney," c. 13.
(*c*) Co. Litt. 113a.
(*d*) R. Cro. Car. 382.
(*e*) R. Cro. Eliz. 80.
(*f*) Co. Litt. 112b, 113a.
(*g*) Co. Litt. 258a.
(*h*) 1 Salk. 95.

[1] A principal can authorize his agent to act for and bind him in one name as well as in another. Forsyth *v.* Day, 41 Me. 382.

Where an agent is authorized to sign the name of his principal, the principal will be bound if the agent simply signs his (principal's) name, in the same manner as if it were his own name. Forsyth *v.* Day, *supra*.

And this, although the memorandum contained nothing to indicate that he was acting as agent, and although the other party to the instrument did not know that he was acting as agent but thought he was contracting with the attorney personally, and that the signature of the agent was his own name. Hunter *v.* Giddings, 97 Mass. 41. In Wood *v.* Goodridge, 6 Cush. (Mass.) 117; it was held that for the agent to execute powers granted by a power of attorney under seal, it is necessary for him to sign an instrument in such a way as to indicate that he is doing so as agent of the principal.

In Berkley *v.* Judd, 22 Minn. 287, it was held that where a deed purports to be an indenture of the principal, made by his attorney in fact, therein designated by name, it may be properly executed by the attorney by his subscribing and affixing thereto the name and seal of the principal alone.

An assignment of a judgment made on the margin of the record by an agent, in his own name, but by authority of the principal, is good to pass the equitable title at least. Emory *v.* Joice, 70 Mo. 537.

Where the name of the grantor is signed to his deed by another, in his presence, at his request and by his direction, it is binding on him and is properly executed. Lovejoy *v.* Richardson, 68 Me. 386; Gardner *v.* Gardner, 5 Cush. (Mass.) 483; Mutual Ben. Life Insurance Co. *v.* Brown, 30 N. J. Eq. 193.

letter of attorney may be to sue in *omnibus causis motis et movendis*, or to defend a particular suit. Sir Philip Sydney, when he went to travel, gave a letter of attorney to Sir Thos. Walsingham to act and sell all his goods and chattels; and this was held good. Where the authority is particular the party must pursue it. If the act varies from it, he departs from his authority, and what he does is void; but that must be intended of a variance not in circumstance, but of a variance material and substantial." This distinction has been adopted by Mr. Justice Story (*i*): he observes that "it may be laid down as a general rule that in order to bind the ★ principal (supposing the instrument in other respects [★ 203] to be properly executed), the acts done must be within the scope of the authority committed to the agent; in other words, his authority or commission must be punctiliously and properly pursued, and its limitations and extent duly observed, although a circumstantial variance in its execution will not defeat it.[1] If the act varies substantially (and not merely in form) from the authority or commission in its nature, or extent, or degree, it is void as to the principal, and does not bind him."[2] Such being the principle, it would be very desirable to define the words "material and substantial variance." To do so with precision is, perhaps, impossible.

Whether the variance is material depends upon the particular case.]—It is evident to anyone who considers the matter, that the variance between the act done by an agent and the act authorized by the principal, may range through every degree of difference. The variance may be infinitesimal, or it may be so great as to mark an absolute departure from the authority conferred. To determine the exact point between those two extremes at which a variance becomes substantial and material, often gives rise to difficult questions. The result in each case must depend upon the circumstan-

(*i*) Story on Agency, § 165.

[1] Parkhill *v.* Imlay, 15 Wend. 431.

[2] As where A. authorizes B. to sign his name to a note for a certain sum payable in six months, and B. signed a note payable in sixty days, held A. was not liable. Batty *v.* Carswell, 2 Johns. (N. Y.) 48.

A. gave B. a power of attorney "to grant, bargain, sell, release, &c. in fee" certain lands and on such sale to "execute, seal and deliver in the name of A. such conveyances and assurances in the law of the premises to the purchaser, in fee, as should be needful and necessary, according to the judgment of B. his attorney." It was held that B. had no power to execute a deed with the usual covenants of *seisin*, &c. Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58.

Where one authorizes his name to be signed to a note, but instructed the agent not to go outside of his family for co-securities, and the agent in signing the name of the principal did so in conjunction with another, who was not a member of the family, held the principal, was not liable. First Nat. Bank *v.* Gay, 63 Mo. 34.

The authority to collect debts in the absence of a presumption arising from the usage of the business or habits of dealing between the parties, does not imply an authority to release a debt. Herring *v.* Hottendorf, 74 N. C. 588; Baxter *v.* Lamont, 60 Ill. 237; Meade *v.* Brothers, 28 Wis. 689; Abrahams *v.* Weiler, 87 Ill. 179; Fougue *v.* Burgess, 87 Ill. 179.

ces of the particular case. Certain cases are sufficiently clear. Thus, if a person is authorized to contract for the erection of a church, and he contracts for the erection of a dwelling-house; or if his commission is to sell a quantity of corn, and he sells a quantity of bread; or if he has authority to buy unsawn timber, and he buys furniture, the variance is manifestly material. The cases already referred to in the chapter upon the implied authority of agents may be usefully consulted in further illustration of this subject.

Illustrations of the principle.]—The following cases also may be referred to: A power of attorney empowering an agent "to demand, sue for, recover and receive, by all lawful ways and means, all moneys, debts and dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal (*j*); but where an agent is authorized to act for the principal generally, in his absence, the agent has authority to instruct a solicitor to appear on behalf of the principal to show cause against an adjudication of [★ 204] bankruptcy (*k*). In *Willis* ★ v. *Palmer* (*l*), a shipowner authorized an agent to sign any bottomry bond or instrument of hypothecation on the vessel or her cargo, and to sell and dispose of either absolutely, or by way of mortgage or otherwise, as he should think proper, the vessel or any share thereof, and to execute all instruments and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all the acts about the business and the affairs aforesaid, which the owner, if present, could have done. The Court of Common Pleas held that this power authorized the agent to assign the passage money of the passengers on board by way of security for the repayment of 4,000*l.* advanced for the purpose of enabling the ship to sail. So where certain shipowners, whose vessel had once been classed A 1 at Lloyd's in London, empowered their agent by letter of attorney to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner and in all respects as he should think proper, and generally to represent the owners in relation thereto, and in relation to her management or sale, as fully as if the owners were personally present, and to do all things necessary for that purpose, the Court of Exchequer held that the agent had duly executed his authority, though he gave a warrant in a charter-party that the ship was A 1 at Lloyd's at the time of the charter-party, though she was not so described in the power of attorney (*m*). As to implied powers to indorse, see further *Esdaile* v. *La Nauze* (*n*); *Bank of Bengal* v. *M'Leod* (*o*).

Persons contracting without authority.]—As to the second class

(*j*) Murray v. East India Company, 5 B. & Ald. 204.
(*k*) *Ex parte* Frampton, 1 De G., F. & J. 263.
(*l*) 7 C. B., N. S. 340; 29 L. J., C. P. 194.
(*m*) Routh v. McMillan, 2 H. & C. 750; 33 L. J., Ex. 38.
(*n*) 1 Y. & C. 394.
(*o*) 7 Moore, P. C. C. 35.

of cases, the rule is that a person who enters into a contract as agent, and without authority, renders himself liable (*p*).[1]

Cases where agent does more or less than is justified.]—As to the third class of cases, one of the earliest authorities is contained in Lord Coke's "Commentary upon Littleton," where it is said: "Regularly, it is true, that where a man doth less than the commandment or authority committed unto him, there (the commandment or authority being not pursued) the act is void. And when a man doth that which he is authorized to do, ★ and [★ 205] more, there it is good for that which is warranted, and void for the rest: yet both these rules have divers exceptions and limitations" (*q*). The instance given by Littleton of an exception in the former rule, is that if a man be so languishing or decrepit that he cannot by any means come to the land, nor to any parcel of it, or if there be a recluse, which may not, by reason of his orders, go out of his house, if such manner of person command his servant to go and make claim for him, and such servant dare not go to the land, nor to any parcel of it, for doubt of beating, mayhem, or death, and for this cause the servant comes so near to the land as he dares for such doubt, and makes the claim for his master, it seems that such claim for his master is strong enough, and good in law" (*r*). The summary of the law by Sir Thos. Clarke, in *Alexander* v. *Alexander* (*s*), is to the effect that where there is a complete execution of a power and something *ex abundanti* added, which is improper, there the execution is good, and only the excess is void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad.[2] Hence, where an appointment has been made to the

(*p*) See Book III., Chap. 3.
(*q*) Co. Litt. 258a.
(*r*) *Ibid.*
(*s*) 2 Ves. 644.

[1] If, however, there are no apt words in the contract to charge him personally, he will not be liable; as in case of a promissory note "I promise to pay," &c., signed "A. B. by his trustee C. D." If C. D. has no authority to make such a note he is not liable on the contract.

It is very evident that the parties did not intend that C. D. should be personally bound. C. D. nevertheless is liable to an action for the deceit. Taylor *v.* Shelton, 30 Conn. 122.

In White *v.* Madison, 26 N. Y. 117, Selden, J., said, that the agent's liability in such cases rests upon the ground that he warrants his authority, and not that the contract is to be deemed his own. The damages are measured not by the contract but by the injury resulting from such want of power on the part of the agent. To the same effect and prescribing a similar remedy, see Noyes *v.* Loring, 55 Me. 408; Sheffield *v.* Ladue, 16 Minn. 388; McCurdy *v.* Rodgers, 21 Wis. 197; Duncan *v.* Niles, 32 Ill. 532; Bartlet *v.* Tucker, 104 Mass. 336.

[2] Where the agent is authorized to draw upon the principal a bill of exchange at four months, and the bill drawn was antedated so as to become payable in less than four months, the principal is not bound. Tate *v.* Evans, 7 Mo. 419. A. authorized B. to subscribe for him for a certain number of shares of capital stock in a railroad, when certain improvements were *located* and *erected* at a certain place. B. subscribed the name of A. to such subscrip-

objects of a power, and a restriction in excess of the power has been superadded, the restriction is void and the appointment is good (*t*). In *Re Brown's Trusts* (*u*), where an appointment under a power was held void *in toto*, Sir W. Page-Wood, V.-C., observed, "I think this case is quite clear. It is obvious that as to some of the objects of it the appointment is in excess of the power, as to others it may be within it; but as I cannot possibly define the class which may fall within the power and those which must be without it, I cannot make any distinction, and must therefore hold that the whole gift fails."

Execution of Parliamentary powers.]—Lastly, where persons have special powers conferred upon them by Parliament for effecting a particular purpose they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object (*x*).

(*t*) Kampf *v.* Jones, 2 Keen, 756; Harvey *v.* Stracey, 1 Drew, 73, 138; Churchill *v.* Churchill, L. Rep., 5 Eq. 44.
(*u*) L. Rep., 1 Eq. 74.
(*x*) Galloway *v.* London (Mayor of), L. R., 1 H. L. 34.

tions payable on the *location* of such improvements. Held, that A. was not liable. Drover *v.* Evans, 59 Ind. 454; Switzer *v.* Wilvers, 24 Kans. 384; Smith *v.* Stephenson, 45 Iowa, 645; Bennett *v.* City Ins. Co., 115 Mass. 241.

★ CHAPTER II. [★ 206]

OF THE EXECUTION OF AUTHORITY BY INSTRUMENT UNDER SEAL.

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Agent may render himself personally liable.]—In executing his authority an agent must take care so to execute it as not to render himself personally liable. There is a great number of authorities reported under this head, but inasmuch as different rules apply to different sets of circumstances, it will be convenient to consider the authorities in the following order:—

A.—In the case of instruments under seal.

B.—In the case of instruments other than deeds.

1. Bills of exchange.
2. Promissory notes.
3. Charter-parties not under seal.
4. Bought and sold notes.

C.—In other cases.

First as to deeds. A duly authorized agent may so execute a deed that—

(a.) It will bind the principal and not himself; or

(b.) It will bind himself, and not the principal; or

(c.) It will be void.

A deed will bind the principal if executed in his name and on his behalf, and this fact appears on the face of the instrument.[1]

[1] Gardner *v.* Gardner, 5 Cush. (Mass.) 483; Mahoney *v.* McLean, 26 Minn. 415. A promissory note of this form; "One year after date we promise to pay to the order of A. B. one thousand dollars, value received," and signed "George Moore, treasurer of Mechanics Falls Dairying Association," held that the Association was not bound but that it was a personal note of George Moore. Mellen *v.* Moore, 68 Me. 39.

Contracts made by agents of a public corporation differ from those made by an agent of an individual person or private corporation. A note given by a

As to the signature, sealing, and delivering, a rule has been laid [★ 207] ★ down in an early case for the guidance of the agent. If A. B. duly authorize C. D. to execute a deed for him, C. D. may do this either by writing "A. B. by C. D., his attorney," or by writing "C. D., for A. B.," provided he delivers the instrument as the deed of A. B. (*a*).

Agent liable if he contracts in his own name.]—If an agent makes himself a contracting party he will be liable on the deed, although he may profess in the instrument to contract on behalf of a third party. The main question to be decided in all these cases is this, do the terms of the instrument disclose a personal undertaking or not? There are numerous instances in which agents have contracted on behalf of others, but in their own name, and have accordingly been held personally liable (*b*).[1]

Deeds executed by agent may be void.]—There is another class of cases, in which deeds executed by an agent have been declared void at common law, on the ground that the agent has by the words of the deed assumed to do something in his own name with the property of his principal which he had no power to do in his own name (*c*).[2]

Illustrations.]—The following cases illustrate the above propositions:—

In *Cass* v. *Rudele* (*d*), 1692, defendant covenanted on behalf of another person to purchase certain houses for 800*l.*, and he was held personally liable. The case is badly reported in Vernon.

(*a*) Wilks *v.* Back, 2 East, 142.
(*b*) See cases *infra*.
(*c*) Frontin *v.* Small, *infra*.
(*d*) 2 Vern. 280.

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trustee of a school township was as follows: "One year after date we promise to pay to the order of William E. Sanderson, negotiable and payable at Monticello." &c., and signed "H. P. Anderson, C. W. Kendal, School Trustees," held it was a note of the township and not of the trustees. School Township of Monticello *v.* Kendall, 72 Ind. 91.

[1] In case of a bond, "I promise to pay to the order, &c., witness my hand and seal," signed by "H. S. L. [Seal] for C. President of the Chester Mica & Porcelain Co."; imposed a personal liability on H. S. L. Bryson *v.* Lucas, 84 N. C. 680.

If a committee appointed by the directors of a turnpike company covenant under their hands and seals to pay money to one for making part of the turnpike, they are personally liable. Tippets *v.* Walker, 4 Mass. 595.

A written instrument commencing thus: "A contract or articles of agreement made and concluded this 14th day of December, 1821, between James Hillhouse, commissioner of the school fund of the State of Connecticut, for and in behalf of said State, to and for the use and benefit of said school fund of the first part, and Joshua Field, of Clarkson, of second part, &c., and signed Joshua Field, L. S., "James Hillhouse, com'r of the school fund, L. S."

Held that James Hillhouse had entered into a personal contract. Spencer *v.* Field, 10 Wend. (N. Y.) 87. See, also, Nixon *v.* Downey, 49 Iowa, 166; Baldwin *v.* Leonard, 39 Vt. 266, 2 Kent's Com. 63 (13th ed.)

[2] Fowler *v.* Shearer, 7 Mas. 14; Stinchfield *v.* Little, 1 Greene, 231; Elwell *v.* Shaw, 16 Mass. 42; McNaughten *v.* Partridge, 11 Ohio, 223.

Where a bond, reciting that differences subsisted between A. B. and the plaintiff, was conditioned to be void if the defendant "for and on behalf of A. B.," should perform the award of certain arbitrators, the court held that an award directing payment of a sum of money by the defendant, made in accordance with the submission, was binding on the defendant (*e*).

M. Frontin v. *Small* (*f*), 1726, was an action in covenant. In the declaration the plaintiff stated that by a deed made between herself, "attorney of James Frontin of the one part," and the defendant of the other part, she "for and in the name and as attorney of the said James," demised a house to the defendant, who agreed to pay rent "to the said James Frontin." ★The deed was de- [★ 208] clared void by the whole court, on the ground that an agent has no power to execute a deed for another in his own name.

Appleton v. *Binks* (*g*), 1804, was an action in covenant. Certain covenants were expressed to be made between the plaintiff on the one part, and the defendant, by the name of J. Binks, of, &c., "for and on the part and behalf of the Right Hon. Lord Viscount Rokeby," of the other part. The deed was sealed with the defendant's seal. In consideration of 6,000*l.* paid by Lord Rokeby, the plaintiff covenanted to make certain conveyances to the said Lord Rokeby. In consideration of this covenant, the defendant "for himself, his heirs, &c., on the part and behalf of the said Lord Rokeby," covenanted with the plaintiff that Lord Rokeby should pay to the plaintiff the amount of 6,000*l.* purchase money at the time of sealing and executing the conveyances. The plaintiff averred that the money had not been paid. The defendant demurred, and urged, first, that a deed could not be made by an agent as such; or, secondly, if it could, covenant did not lie against him, upon articles describing him to be merely agent for another. Judgment, however, was given for the plaintiff. Lord Ellenborough and the other judges were of opinion that it could not be contended that where one covenants for another he is not bound by the act, the covenant being in his own name, "for himself, his heirs, &c.;" that there was nothing unusual or inconsistent in the nature of the thing that one should covenant to another that a third person should do a certain thing. The party to whom a covenant is made may prefer the security of the covenanter to that of his principal; and it was quite possible in the present case that the defendant consented to bind himself upon an indemnity.

Wilks v. *Back* (*h*), 1802, was a motion to set aside an award. The sole question was whether the bond of submission to arbitration had been duly executed. Wilks was duly authorized by one

(*e*) Clayhill *v.* Fitzgerald, 1 Wils. 28, 58; and see Bacon *v.* Dubarry, 1 Ld. Raym. 246; S. C., 1 Salk. 70.
(*f*) 2 Ld. Raym. 1419; S. C., 2 Str. 705.
(*g*) 5 East, 148.
(*h*) 2 East, 142.

Browne to submit certain matters in dispute to arbitration. By virtue of this authority he executed the bond in this form: "For J. B., M. W. (L.S.)" Wilks, being a party, signed, sealed, and delivered for himself as well.

Grose, J., observes: "No doubt the award must be mutual. . . . but this is sufficient execution by both. I accede to the doctrine [★ 209] ★ in all the cases cited, that an attorney must execute his power in the name of his principal, and not in his own name; but here it was so done, for where is the difference between signing 'J. B., by M. W., his attorney' (which must be admitted to be good), and 'M. W., for J. B.'?"

Lawrence, J., distinguishing the case from *Frontin* v. *Small* (*i*), said: "This is not like the case in Lord Raymond's Reports, where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by Wilks, for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not that even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough, without stating that he had so done. . . . There is no particular form of words to be used, provided the act be done in the name of a principal."

In *Gardner* v. *Lachlin* (*k*), 1833, the Lord Chancellor (Brougham) says: "The whole question turns upon the charter-party and the rights and liabilities under it. It is an Instrument under seal, and the parties to it are the Commissioners of the Navy, and the defendant L., who is described in the deed as acting for and on behalf of the owners, but he only is the party to it."

In *Tanner* v. *Christian* (*l*), 1855, an agreement in writing was expressed to be made "between Christian, for and on behalf of Norris, of the first part, and Tanner of the second part." By it Christian, on the part of Norris, agreed to let to Tanner certain premises for a term of years, Tanner paying rent to Christian for the use of Norris, Tanner to take a lease when called upon to do so by Christian on the part of Norris. The defendant signed this agreement in his own name. In an action for not completing the lease, the court held that it sufficiently appeared to be the intention of the parties that the defendant should himself contract, and that therefore he was personally liable.

Lewis v. *Nicholson* (*m*), which was decided on the authority of *Downman* v. *Williams* (*n*), was distinguished by Lord Campbell [★ 210] ★ on the ground that the defendants there were not in

(*i*) *Supra.*
(*k*) 6 Sim. 407; 8 Sim. 123; 4 My. & C. 129.
(*l*) 4 E. & B. 591.
(*m*) 18 Q. B. 503.
(*n*) 7 Q. B. 103.

any way to act in carrying out the agreement. They were solicitors who signed for and on behalf of their clients.

Pickering's claim (*o*), decided in 1871, was an appeal from a decision of Vice-Chancellor Stuart, rejecting a claim of 292,000*l.* in the winding up of the International Contract Company. By two agreements under seal, J. P. assigned certain concessions to E. Pickering (the managing director of the above company) for a large consideration. The only parties to the deeds were J. P. and E. Pickering, nor did it appear from the instruments that E. P. was acting on behalf of the company. Evidence, however, was given that the negotiations for the assignments were in great part conducted in the presence of several directors of the company, and that J. P. was informed by E. Pickering, before the execution of the agreements, that the latter was acting on behalf of the company. The company paid part of the amount, and was subsequently ordered to be wound-up. The lords justices affirmed the decision of the court below, rejecting the claim for the residue of the amount. For the appellant it was urged that he had dealt with E. Pickering as a trustee for the company, and that although the deeds were under seal, yet in equity the substance rather than the form of the transaction would be regarded. Their lordships did not call upon the counsel for the official liquidator. "The deed being under seal, the appellant has elected to charge E. Pickering alone. If a lessee assigns the lease to a trustee for a third party, and the trustee covenants with the assignor to indemnify him, the assignor has accepted the trustee as the party liable, and cannot sue the *cestui que trust*." Lord Justice James thought the case thus put by Lord Justice Mellish precisely in point.

Contracts of urban authorities—Public Health Act, 1875.]—The House of Lords, in 1883 (following *Hunt* v. *The Wimbledon Local Board* (*p*)), decided that sub-sect. 1 of sect. 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority," is obligatory, and not merely directory, and applies to an executed contract of ★ which the urban author- [★ 211] ity have had the full benefit and enjoyment, and which has been effected by their agent duly appointed under their common seal (*q*).

Bramwell, J., in *Hunt* v. *The Wimbledon Local Board* (*r*), in referring to the 174th section, said: "The section is not merely directory, but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal; an offence, but it is a mandatory direction that contracts shall be made in a particular way; that is to say, in writing and under seal.

(*o*) L. Rep., 6 Ch. 525.
(*p*) L. R., 4 C. P. D. 48.
(*q*) Young *v.* Mayor, &c. of Leamington, 8 App. Ca. 517.
(*r*) *Ubi supra*.

The enactment relates to a contract which is the act of both parties, and is applicable not to one of them alone, but to both of them. I do not mean to say that the section makes anything particularly necessary upon the part of the contractor, but it requires that the obligation of the two parties must be in writing and sealed with their seals." It was argued that the plaintiff was entitled to recover at common law, on the ground that the local board had had the benefit of the contract upon which he sued. This contention, however, was not determined, inasmuch as the court held that it was not justified by the facts.

Verbal contract with agent of company—Equitable jurisdiction.]—The difficulty of avoiding the disadvantages which may result from the absence of a company's seal was well illustrated in *Crampton* v. *Varna Railway Co.* (*s*). The agent of the defendant company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him 5,000*l.* The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid 500*l.* a-year for the cottages by way of rent, with an option to the company to purchase them for 5,000*l.* The agreement was confirmed by a resolution of the board of directors. The company paid the 500*l.* a-year for some years, and then refused to pay. Lord Hatherley, C., affirming the order of Lord [★212] Romilly, ★ M. R., held, first, that the claim of the contractor, being simply for payment of money, could not be enforced in the Court of Chancery, and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money; and, secondly, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation.

(*s*) L. R., 7 Ch. Ap. 562. And see Mayor of Kidderminster v. Hardwick, L. R., 9 Ex. 13.

★ CHAPTER III. [★ 213]

OF THE EXECUTION OF PAROL CONTRACTS.

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SECT. 1.—*The drawing and accepting Bills of Exchange.*

Agent's liability on bill of exchange.]—In the following summary an attempt is made to digest the rules relating to the drawing and accepting of bills of exchange by an agent.

It is assumed in this and the following summaries that the agent has full authority to contract on behalf of his principal.

Bills drawn on principal accepted by agent.]—(a.) If a bill is addressed to a principal and accepted by his agent on behalf of that principal, the principal and not the agent will be liable as acceptor (*a*).[1]

It is not necessary that the agent should state on the face of the instrument any words to the effect that he accepts on behalf of the drawee (*b*). This decision considerably limits the "universal ★rule" mentioned by Lord Ellenborough in *Leadbitter* v. [★ 214] *Farrow* (*c*).

(*a*) Halford *v.* The Cameron, &c. Co., 16 Q. B. 442.

(*b*) Okell *v.* Charles, 34 L. T. Rep., N. S. 822, a decision upon the 47th section of the Companies act, 1862.

(*c*) 5 M. & S. 345.

[1] Chipman *v.* Foster, 119 Mass. 189; Lazarus *v.* Shearer, 2 Ala. 718; Lyman *v.* Sherwood, 20 Vt. 42.

The drawee of a bill may accept it by the hand and in the name of his agent (*d*).

Bills drawn on Agent.]—(b.) If the bill is drawn upon an agent in a personal character, he will be liable as acceptor, although he accepts for or on behalf of his principal (*e*).[1]

This rule seems to be the result of the operation of two other rules, the first being that no one can be liable as acceptor but the person to whom the bill is addressed, unless he is an acceptor for honour (*f*); the second, that the words of an instrument must not be construed so as to make it void, if they will reasonably bear an interpretation making it valid (*g*).

Bills drawn by agent.]—(c.) If a bill is drawn by an agent in his personal character, he will be personally liable as drawer (*h*).[2] It is doubtful whether the principle of *Okell* v. *Charles* (*i*) could be applied to the case of a drawer of a bill. The tendency of the Court of Appeal has certainly been not to increase the stringency of the rule that parol evidence cannot be given *dehors* the instrument.

Bills drawn on several accepted by one or more.]—(d.) If a bill is drawn upon several, one of whom accepts, he is liable as acceptor (*j*). So, if more accept, they are liable (*k*).[3] The debt of a third person is a good consideration for which a man may bind himself by giving a bill of exchange (*l*).

Illustrations.]—This branch of law may be illustrated by a reference to the following cases:—

Bill drawn on agent.]—In *Thomas* v. *Bishop* (*m*), 1734, a bill was drawn and accepted in the following terms:—

"Pay to J. S. or order value received of him, and place the same to the account of the York Building Company, as per advice from Charles Mildmay.

"To Mr. Humphrey Bishop, cashier of the York Building Company.

"Accepted per H. BISHOP."

[★ 215] ★ At the trial it was proved that the letter of advice was addressed to the company, and that the defendant was ordered to accept the bill. A verdict was entered for the plaintiffs, and the

(*d*) Lindus *v.* Bradwell, *infra.*
(*e*) Thomas *v.* Bishop, 2 Str. 955; Nichols *v.* Diamond, 9 Ex. 154; Mare *v.* Charles, 5 E. & B. 978.
(*f*) Polhill *v.* Walter, 3 B. & Ald. 164.
(*g*) Mare *v.* Charles, *supra.*
(*h*) Leadbitter *v.* Farrow, *supra.*
(*i*) *Supra.*
(*j*) Owen *v.* Van Uster, *infra.*
(*k*) Bult *v.* Morrell, *infra.*
(*l*) Popplewell *v.* Wilson, *infra.*
(*m*) 2 Str. 955.

[1] Pentz *v.* Stanton, 10 Wend. N. Y. 271.
[2] Drake *v.* Llewellyen, 33 Ala. 106.
[3] Byles on Bills, 189.

court refused to grant a new trial, holding that the defendant was personally liable, because the bill on the face of it imported to be drawn upon him, and was accepted by him generally.

Statement of the law by Lord Ellenborough.]—In *Leadbitter* v. *Farrow* (*n*), 1816, the plaintiff had sent 50*l.* to the defendant, the agent of a county bank, in order to procure a bill of exchange. A bill in the following form was returned:—

"Forty days after date pay to the order of Mr. Thos. Leadbitter fifty pounds, value received, which place to the account of the Durham Bank, as advised.

"Messrs. Wetherall and Co., bankers, London,

(Signed) "CHRISTR. FARROW."

At the trial a verdict was entered for the plaintiff, subject to the opinion of the court upon a special case. The liability of the defendant was urged upon the ground that as there was nothing on the face of the bill to show that it was drawn by him as an agent, this fact could not be shown by parol evidence *dehors* the instrument. Judgment was entered for the plaintiff.

"Is it not a universal rule," said Lord Ellenborough, "that a man who puts his name to a bill of exchange makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable." The question whether an action would or would not lie against the Durham Bank was considered immaterial; nor do the words indicating the account to which the amount of the bill was to be placed affect the legal obligation of the promisor (*o*).

Acceptance by stranger.]—It is laid down generally in *Polhill* v. *Walter* (*p*), "that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour." In *Davis* v. *Clarke* (*q*) one John Hart drew a ★ bill pay- [★ 216] able to himself or order, addressed to John Hart. The defendant wrote across it: "Accepted, H. J. Clarke," and the court held that Clarke could not be sued as acceptor.

Acceptance in name of wife.]—In *Lindus* v. *Bradwell* (*r*), 1848, a bill addressed to the defendant by the name of "William Bradwell" was accepted by his wife by writing across it her own name, Mary Bradwell. There was no evidence of any express authority in the wife so to accept the bill. But after it became due, it was presented to the husband. He then said he knew all about it, and would pay it very shortly. The husband was held liable as acceptor.

Mr. Justice Maule observed: "It is said that a drawee cannot

(*n*) 5 M. & S. 345.
(*o*) Per Kelly, C. B., in Alexander v. Sizer, L. Rep., 4 Ex. 105.
(*p*) 3 B. & Ad. 114.
(*q*) 6 Q. B. 16.
(*r*) 5 C. B. 583; 17 L. J., C. P., 12; 12 Jur. 230.

bind himself otherwise than by writing his name on the bill. But suppose the drawee with his own hand accepts the bill by writing another name across it, will he not be liable? Here the defendant has, by the hand of his wife, written 'Mary Bradwell' on the bill. If he had done that with his own hand it clearly would have been his own acceptance . . . Nobody but the defendant could accept this bill so as to charge him, but he has accepted it by the hand and in the name of his wife, and that I think is a sufficient acceptance to bind him." The other judges concurred. The authority relied upon by the court was the case of *Cotes* v. *Davis* (*r*), where Lord Ellenborough held that the court might presume that a husband had authorized his wife to indorse notes in the name by which she herself passed in the world. The husband was estopped from contesting her authority (*s*).

Bill drawn on firm accepted by one partner.]—Where a bill drawn on a firm is accepted by one partner, either the acceptor or the firm may be sued (*t*).[1] Care must, however, be exercised in distinguishing between incorporated companies and partnerships. The above rule is true only of the latter.

The rule of law stated by Maule, J.]—*Owen* v. *Van Uster* (*u*) 1850, was an action by the drawer against defendant as acceptor. A bill was addressed to the Allty-Crib Mining Co., and accepted by the defendant, as follows: Per proc. The Allty-Crib Mining [★ 217] Co. W. T. Van Uster, London Manager." ★ At the trial proof was given that four persons, one of whom was the defendant, had agreed to work a mine under the name of the above company, and had for some time worked it accordingly, and that the bill in question had been accepted by the defendant without the authority of his co-partners. The court held, upon motion for a new trial, that the defendant was liable as acceptor. In the argument for the defendant reliance was chiefly placed upon the law merchant, which required identity in drawee and acceptor. "An acceptance by one," said Maule, J., "of a bill of exchange addressed to four, renders the actual acceptor personally liable. . . . When the bill is offered for acceptance, it is an inchoate contract. If the bill is addressed to four, and one contracts, why should he not be liable?" The reporters sum up the principles laid down by Beawes and Molloy in a note at the end of the case. Beawes impliedly, and Molloy expressly, drew the distinction between an

(*r*) 1 Camp. 485.
(*s*) See, too, Prestwick *v.* Marshall, 7 Bing. 565; Prince *v.* Brunatte, 1 Scott, 342.
(*t*) Mason *v.* Rumsey, 1 Camp. 384.
(*u*) 10 C. B. 318; 20 L. J., C. P. 61.

[1] The power of a partner to bind his co-partner is limited by the nature of the business transacted; consequently his right to accept a bill drawn on the firm may be limited by the kind of partnership, whether commercial, legal, medical, &c. See Crosthwaite *v.* Ross, 1 Humph. (Tenn.) 23.

acceptance by one of two joint drawees who are partners, and an acceptance by one of two joint drawees who are not partners. In the former case, there being an implied authority arising out of the partnership relation, an acceptance by one is the acceptance of both; in the latter case, an acceptance by one would be void as against the drawer, and against all indorsers preceding the party who obtained and acquiesced in the defective acceptance.

Acceptance by directors of company—Requisites of, to bind company.]—*Halford* v. *Cameron Coalbrook, &c. Company* (*x*), 1851, was a decision upon 7 & 8 Vict. c. 110, s. 45, which provided, "If a bill of exchange drawn upon a joint-stock company regulated by that act, be accepted by two of the directors, the acceptance is void as against the company," if not "expressed . . . to be accepted" by such directors "on behalf of such company," though the clause does not contain any words of nullification.

A bill was directed to the company by their corporate name, and sealed with the corporate seal, which had the name of the company circumscribed. It was accepted by two persons describing themselves "directors of the C. C. &c. Co., appointed to accept this bill." The acceptance was countersigned by the company's secretary. *Assumpsit* on the bill was brought against ★the company. [★ 218] Verdict having been entered for the plaintiff, the court, after deliberation, refused to set it aside.

Having referred to the words of the above section, Lord Campbell, who delivered the judgment of the court, went on to say: "We think there is no necessity for the very words and syllables here mentioned to be written by the two directors on the face of the bill. . . . The bill is drawn on the company by its corporate name; it is sealed with the corporate seal, having the corporate name of the company circumscribed, and it is countersigned by the secretary of the company, who so describes himself. Then the two directors write upon the bill 'accepted,' sign their names under that word, and add the above statement." These circumstances were held sufficient to indicate that the bill was accepted by them on behalf of the company.

Bill drawn on purser of company]—*Nichols* v. *Diamond* (*y*) 1853, was an action upon two bills of exchange drawn by the plaintiff upon the defendant and accepted by him. The bills were addressed to "J. D., Purser, West Downs Mining Company," and accepted in the following form: "J. D., accepted, per proc. West Downs Mining Company." The defendant was a shareholder in the company. It was incorporated. The court refused to grant a rule to set aside the verdict, which had been entered for the plaintiff. "The bills," observed Alderson, B., "are drawn upon the defendant in his personal character, and he chooses to accept them

(*x*) 16 Q. B. 442; 20 L. J., Q. B. 160. See Okell *v.* Charles, 34 L. T. 822; and the Companies Act, 1862, s. 47.

(*y*) 9 Ex. 154; 23 L. J., Ex. 1.

[★ 221] refused to nonsuit the plaintiff, but ★ gave leave to move to enter a nonsuit. The rule was afterwards discharged.

Bayley, B., thought "there was in this case no question for the jury whether value had passed from the plaintiff to the defendant for the bill . . . we cannot say there was no consideration for so signing it. If drawn to accommodate any person, it was drawn not for the accommodation of the plaintiff, but of Rt. Butcher. The plaintiffs had supplied goods consigned to D. and Co., for which R. Butcher was liable, and for which he drew a bill on the consignees which made him responsible as drawer, if they did not pay. The bill was returned unaccepted; the plaintiff's then had a right to sue R. Butcher for not procuring D.'s acceptance, or to have a new bill from him. They elected a new bill at a longer date . . . On application at Rt. B.'s counting-house, they saw the defendant, and on his stating his brother R.'s absence, requested him to sign the bill as drawer. It was then in his discretion to sign the bill or not, and if he signed it, he might state on the face of it that he did so as agent for Rt. B., or have signed it by procuration R. B., John Butcher . . . It is no answer to say that he had no consideration for binding himself personally, if he has professed to do so." The debt of a third person is a good consideration for which a man may bind himself by giving a bill of exchange (*f*).[1]

Acceptance with words limiting liability.]—Though an acceptor may purport to accept in some manner limiting his personal liability, he becomes liable personally upon his acceptance. He cannot vary or limit his liability on the contract; by his acceptance of the bill which is addressed to him, it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him. Bills of exchange are all drawn on the intended acceptor in a personal character, and if he accept them he must be held to have done so in that character, and will be held liable, no matter what words of mere description are added to his name (*g*).

Bill drawn by broker on vendee.]—In *Le Fevre* v. *Lloyd* (*h*), 1814, the Court of Common Pleas decided that if a broker draws in favour of his principal upon the buyer of goods which he has sold for his principal to whom he indorses the bill, he is [★222] liable ★ as a drawer to such indorsee. The defence set up was that the agent having drawn the bill only as agent without any consideration for so doing, was not liable. The court, however, thought that the broker, by giving this bill put an end to all doubt as to the buyer's responsibility, and caused his principal to dismiss all concern about the solvency of the purchaser.

(*f*) Popplewell *v.* Wilson, Stra. 264.
(*g*) *Per* Kelly, C. B., in Alexander *v.* Sizer, *infra*.
(*h*) 5 Taunt. 749.

[1] Brainerd *v.* Capella, 31 Mo. 428.

Bill drawn by commission agent acting for company of which he was a member.]—In *Teague* v. *Hubbard* (*i*), a member of a Cornish tin smelting company was employed by the company as their agent to sell goods, receiving a commission for his trouble. W. having sold goods on account of the company, drew on the purchaser a bill of exchange, payable to his (the drawer's) own order, and after it had been accepted indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company; the company being then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition, and the court held that the indorsee, being a member of the company, could not sue the drawer of the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account.

Effect of the Companies Act, 1862, *on liability of directors.*]—In *Okell* v. *Charles* (*k*), 1876, an action was brought against two directors upon the following bill:—

"Pay to my order the sum of for value received.

"THOMAS YOUNG.

"To the Great Snowdon Mountain Copper Mining Company, (Limited), Lombard Street.

"Accepted, payable at Messrs. Barclay, Bevan & Co.

"J. MACDONALD, } Directors of the
"ROB. CHARLES, } Great, &c. Co.
"D. B. CROSBIE, Secretary."

The plaintiff was non-suited at the trial The Common Pleas ★ discharged the rule obtained pursuant to leave [★ 223] reserved to enter a verdict for the plaintiff, on the ground that the directors were not drawees.

In the Court of Appeal the case turned entirely upon the construction of the 47th section of the Companies Act, 1862, which enacts that "a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed in the name of the company by any person acting under the authority of the company; or if made, accepted, or indorsed by or on behalf, or on account of the company, by any person acting under the authority of the company." It was admitted as a matter of fact that the directors had authority to accept the bill.

"In the 45th section of the prior Act" (*l*), said the Master of the Rolls, "it is required not only that bills shall be accepted on behalf

(*i*) 8 B. & C. 345.
(*k*) 34 L. T. Rep., N. S. 822.
(*l*) 7 & 8 Vict. c. 110.

of the company, but also that it shall be by such directors expressed to be made or accepted by them on behalf of the company. But these words are left out in the later act; in other words, they are repealed." To the same effect were the remarks of Chief Baron Kelly. "No terms need appear on the face of the acceptances implying that it is on behalf or by authority of the company. The bill shall bind the company if made by its authority or on its behalf." In other words, no statement of agency need appear on the face of the bill. The question is authority or no authority, and the fact may be proved by evidence *dehors* the instrument. Referring evidently to an argument based on *Dutton* v. *Marsh* (*m*), it was observed by Chief Baron Kelly, "A promissory note is a totally different thing from an acceptance of a bill of exchange." The latter incorporates in the acceptance the person on whom the bill is drawn. The appeal was dismissed.

SECT. 2.—*Promissory Notes.—Summary of Rules.*

Promise and signature as agent.]—(a.) Where a person promises and signs in the character of agent he will not be personally liable, nor where the agent uses words importing agency in the signature [★ 224] only, and not in the body of the instrument, will he ★ be held to be a party to the contract (*n*). Care must be taken to distinguish between words descriptive of the agent's office or employment and words importing agency. The former have no influence upon the contract, whereas the latter indicate that the agent is no party (*o*).

Agent should disclose his agency on face of note.]—(b.) As a general rule, an agent who makes a note cannot relieve himself of liability unless the fact that he made it as agent appears on the face of the instrument.[1] This doctrine, however, would probably be qualified in accordance with a decision of the Court of Exchequer in 1861 (*p*), in which that court decided that where a defendant on the face of a written agreement had contracted as a principal, it was competent to him to show that in fact he signed as agent for a third party, and that the plaintiffs verbally agreed that he should not be responsible as principal.

(*m*) L. R., 6 Q. B. 36; 24 L. T. Rep., N. S. 470; 40 L. J., Q. B. 175.

(*n*) Alexander *v.* Sizer, L. Rep., 4 Ex. 105; *Ex parte* Buckley, 14 M. & W. 469, overruling Hall *v.* Smith, 1 B. & C. 407.

(*o*) See Dutton *v.* Marsh, L. R., 6 Q. B. 361; and cases, *infra*.

(*p*) Wake *v.* Harrup, 30 L. J., Ex. 273.

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[1] Sturdivant *v.* Hull, 59 Me. 172; Roberts *v.* Button, 14 Vt. 195; Rice *v.* Gove, 22 Pick. 158; Carpenter *v.* Farnsworth, 106 Mass. 561; Whitney *v.* Stowe, 111 Mass. 368; Olcott *v.* Tioga R. R., 27 N. Y. 546; Campbell *v.* Baker, 2 Watts. (Pa.) 83; King *v.* Handy, 2 Ill. App. 212; Lacy *v.* Dubuque Lumber Co., 43 Iowa, 510. See Barclay *v.* Parsley, 110 Pa. St. 13.

Distinction between bills of exchange and notes.]—(c) Confusion has sometimes been introduced into arguments owing to a mistaken identification of the principles applicable to bills of exchange with those that are applicable to promissory notes. Two distinctions between these instruments should never be lost sight of. The first is that a bill of exchange incorporates in the acceptance the person on whom the bill is drawn. The second is that an acceptor cannot limit or vary his liability by addition of words of description. If the names of the drawee and acceptor are not the same, the rule that the acceptor and drawee must be identical is not necessarily infringed. Parol evidence may be given to show that the acceptor has authority from the drawee to accept on his behalf. If this evidence is given the bill is valid and binding on the drawee (*q*), for he is incorporated in the acceptance. The meaning of the second distinction is clear: an acceptor who is drawn upon personally cannot exempt himself from liability by accepting on behalf of another person to whom the bill is not addressed. The *dictum* of Lord Ellenborough in *Leadbitter* v. *Farrow* (*r*), though inapplicable to acceptance of bills of exchange by agents, is still good law in the case of promissory notes (*s*).

★ *Illustrations.*]—The following cases illustrate the [★ 225] liability of agents upon promissory notes:—

Promise by partner for firm.]—In *Ex parte Buckley* (*t*), 1845, one of a firm of bankers signed the following promissory note:

"I promise to pay the bearer on demand, &c.

"For A. B., C. D.
"R. M."

In holding that the firm, and not the agent, was liable, the Court of Exchequer overruled the authority of *Hall* v. *Smith* (*u*). "The partner in making the promise," said Parke, B., "is only an agent for the firm . . . No doubt the instrument was intended to bind the firm, and as he had authority to do it, it had that effect" (*x*).[1]

Joint and several promises.]—*Healey* v. *Story* (*y*), 1848, was an action by the payee against the makers of a note in this form:—

"On demand, we jointly and severally promise to pay to , value received, for and on behalf of the Wesleyan Newspaper Association.

"PETER STORY,
"JAS. WARE, } Directors."

(*q*) Lindus *v.* Bradwell, *supra*, and see Okell *v.* Charles, *supra*.
(*r*) *Supra*.
(*s*) See the remarks of Chief Justice Cockburn in Dutton *v.* Marsh, *supra*.
(*t*) 14 M & W. 469.
(*u*) 1 B. & Cr. 407.
(*x*) Approved per Pollock, C. B., in Nichols *v.* Diamond, 9 Ex. 156.
(*y*) 3 Ex. 3; 18 L. J., Ex. 8.

[1] Manning *v.* Hays, 6 Md. 5; Adams *v.* Ruggles, 17 Kans. 237; Carrier *v.* Cameron, 31 Mich. 373,

At the trial the plaintiff had a verdict, and a rule to set it aside was refused on the ground that a joint and several promise is a personal promise.[1] This decision was approved of in *Lindus* v. *Melrose* (*z*), though it was not material to the decision there.

In *Penkivil* v. *Connell* (*a*), 1850, the defendant, a director and shareholder in a joint-stock company, together with three others, made the following promissory note:—

"We, the Directors of the Royal Bank of Australia, for ourselves and the other shareholders of this company, jointly and severally promise to pay , for value received on account of the company.

(Signed) "A. B., C. D., E. F., G. H., Directors."

This case comes within the principle of *Healy* v. *Story* (*b*).

Notes made "for or on behalf of company."]—In *Maclae* v. *Suther-* [★ 226] *land* (*c*), 1854, the directors of an unincorporated and ★ unregistered joint-stock banking company, called the R. Bank of A., made and issued promissory notes in this form:—

"We, directors of the R. Bank of A., for ourselves and other shareholders of the said company, do jointly and severally promise to pay , for value received, on account of the company.

(Signed) "A., Chairman,
"B. and C., Directors."

The court held, that, assuming the parties signing to be authorized to sign promissory notes on account of the partnership, this form of note showed sufficiently an intention to bind the partnership jointly, and that, though the attempt to bind the shareholders severally was *ultra vires* and void, yet they were bound jointly.

In *Aggs* v. *Nicholson* (*d*), 1856, the note was in the following terms:—

"We, two of the directors of the Ark Life Assurance Society, by and on behalf of the said society, do hereby promise to pay to M. or order the sum of , value received.

"A. B. }
"C. D. } Directors."

This note was held to be binding on the company, and not on the directors, it having been expressed to be made by them on behalf of the company.

Agent who signs without disclosing agency, may prove agency, when.]—In *Wake* v. *Harrup* (*e*), 1861, the court decided that where a defendant, on the face of a written agreement, has contracted as a principal, it is competent to him, by way of equitable plea to an action against him, to show that in fact he signed as

(*z*) 2 H. & N. 293.
(*a*) 5 Ex. 381; 19 L. J., Ex. 305.
(*b*) *Supra.*
(*c*) 3 El. & B. 1.
(*d*) 1 H. & N. 165.
(*e*) 30 L. J., Ex. 273; affirmed, 1 H. & C. 202.

[1] Savage *v.* Rix, 9 N. H. 263.

agent for a third party, and that the plaintiffs verbally agreed that he should not be responsible as principal.

Note made by directors of company established under 19 & 20 Vict. c. 47.]—*Lindus* v. *Melrose* (*f*), 1857, was an action upon the following note:—

"£600.

"Three months after date we jointly promise to pay Mr. F. Shaw, or order, £600, for value received in stock, on account of ★ the London and Birmingham Iron and Hardware [★ 227] Company, Limited.

"JAS. MELROSE,
"G. N. WOOD, } Directors.
"JOHN HARRIS,
"EDWIN GUESS, Secretary.

"Indorsed, F. SHAW."

An action upon the note was brought by an indorsee against the directors. At the trial before Channell, B., a verdict for the plaintiffs was given, leave being reserved to the defendants to move to enter the verdict for them. The rule was made absolute.

"This promissory note," said Pollock, C.B., "cannot bind at once the individual directors and the company for which they were acting as agents; and the question is, what is the most reasonable construction to be put upon it?" "If," observed Bramwell, B., "we suppose a personal liability on the part of the directors, there would be a promise by them to pay for value received on account of the company, and the note would be bad on the face of it, as showing a consideration to the company and not to the directors." The expression "for value received in stock," was read in a parenthesis. In the Exchequer Chamber (*g*), the judgment of the court below was affirmed by Coleridge, Cresswell, Williams and Crowder, JJ.; Crompton and Willes, JJ., *dubitantibus*. The company had been established under 19 & 20 Vict. c. 47, the 43rd section of which act provided for the making, accepting or indorsing of notes or bills by a company. The note in question did not satisfy the requisitions of this section; "it does not, therefore, follow conclusively," said Coleridge, J., delivering the judgment of the Court of Appeal, "that the directors are personally liable; for the case was properly argued, and must be decided on what appears to be the expressed intention of the makers of the instrument."

Note made by agents—Words of description only.]—In *Price* v. *Taylor* (*h*), 1860, the note was as follows:—

"Midland Counties Building Society.

"Two months after demand in writing we promise to pay Mr. Thomas Price the sum of one hundred pounds with interest

(*f*) 2 H. & N. 293.
(*g*) 3 H. & N. 177.
(*h*) 5 H. & N. 540; 29 L. J., Ex. 331.

[★ 228] ★ after the rate of six pounds per centum per annum for value received.

"W. H.,
"J. T., } Trustees.
"W. F., Secretary."

The defendants were held to be personally liable. "It does not appear," said Baron Bramwell, "that the defendants undertake for anybody but themselves. If there was anything to show that the note would be binding on the building society, we might hold that the note of the society, and not of the defendants alone, as in *Aggs* v. *Nicholson*" (*i*).

In *Bottomley* v. *Fisher* (*k*), 1862, the note was as follows:—

"Midland Counties Building Society, No. 3.

"One month after date we jointly and severally promise to pay Mr. J. B. Yaum, the sum of , for value received.

"W. R. H.,
"S. B. S., } Directors.
"W. D. F., Secretary."

Action against the society by the payee. At the trial a verdict was entered for the plaintiff, but leave was reserved to the defendant, apparently for the purpose of having the decision of the court upon the question whether the defendant's liability as maker was removed by the fact that he had signed as "secretary." This fact was held to be immaterial.

Note given by members of unregistered society.]—In *Gray* v. *Roper* (*l*), 1866, defendants, who were members of an unregistered society, enrolled and certified under 15 & 16 Vict. c. 31, gave a promissory note in the following form for a debt of the society:—"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," &c. At the trial, Mr. Justice Keating directed the jury to find for the plaintiffs. This ruling was upheld by the whole court, on the ground that the defendants were personally liable.

Note made—Executors]—In *Childs* v. *Monins* (*m*), 1821, the Court of Common Pleas held the makers of the following promissory note personally liable:—

"As executors to the late , we severally and jointly [★ 229] ★ promise to pay to the sum of on demand, together with lawful interest for the same.

"J. M.
"P. B. } Executors.

Dallas, C. J., suggested that they might have limited this liabil-

(*i*) 1 H. & N. 165; see Forbes *v.* Marshall, 11 Ex. 166.
(*k*) 1 H. & C. 211; 31 L. J., Ex. 417.
(*l*) L. R., 1 C. P. 694.
(*m*) 2 Brod. & Bing. 460.

ity by adding the words, "out of the estate of T." to the words "as executors."

Churchwardens.]—In *Crew* v. *Pettit* (*n*), 1834, a parish vestry resolved to borrow money from H. N., who advanced it, and took promissory notes for the amount made by P. W. and F., who were churchwardens and overseers. The notes were in the ordinary form, except that they were signed by the defendants as "churchwardens and overseers." The question of personal liability was only a collateral issue. The makers of the notes were held to be personally liable.

Directors of joint stock company.]—*Dutton* v. *Marsh* (*o*), 1871, was an action by the payee of a promissory note against the defendants as makers. Four directors of a joint stock company signed their names to the following promissory note:—

"We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay J. D. the sum of 1,600*l.* sterling, with interest, &c., for value received."

At one corner of the note the company's seal was affixed, with the words, "Witnessed by L. L." At the trial before Baron Cleasby, a verdict was entered for the plaintiffs, with leave reserved to the defendants to move to enter a verdict for them on the ground that they were not personally liable. The main contention on behalf of the defendants was that personal liability was excluded by the fact that the company's seal was attached. Assuming that the seal had not been affixed, the court had no doubt of the liability of the defendants; the only question was that raised by the above contention. Upon consideration the court unanimously held that the mere affixing of the company's seal did not affect the liability of the directors.

"It does not purport in form," said Chief Justice Cockburn, in delivering the judgment of the court, "to be a promissory note made on behalf or on account of the company. So far as the written portion of it goes, it is totally without any such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note that the note ★ was signed [★ 230] by the persons who put their names to it on behalf of the company, and not of themselves . . . . that effect cannot be given to the placing of the seal of the company upon the note. It may be that that was simply for the purpose of marking the transaction, or, in fact, showing as to the directors that, as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes the length of saying that the affixing the seal, where the parties do not otherwise use terms to exclude their personal liabil-

(*n*) 1 A. & E. 196; affirmed, 3 N. & M. 456.
(*o*) L. R., 6 Q. B. 361.

ity, would have that effect." The rule obtained pursuant to leave reserved was discharged.

Secretary of incorporated company.]—In *Alexander* v. *Sizer* (*p*), the following promissory note was signed by the secretary of an incorporated company:—

"1,500*l.* On demand I promise to pay Messrs. Alexander & Co., or order, the sum of one thousand five hundred pounds, with legal interest thereon till paid, value received the 16th Aug., 1865. For Mistley, Thorpe and Walton Ry. Co. John Sizer, secretary."

In an action on the note by the payees against the secretary, it was held that he was not personally liable, though Baron Cleasby was inclined to think that the defendant had incurred a personal liability because of the pronoun "I" in the body of the instrument.

Note made by directors, countersigned by manager of company.] —*Courtauld* v. *Sanders* (*q*), 1867, was an action by an indorsee of a promissory note against the makers.

"Three months after date we promise to pay," &c., and signed by the defendants, who described themselves in signing as "directors of the Financial Insurance Company (Limited)." The note was countersigned "C. G. G., manager." Verdict for plaintiff. It was argued in support of a rule obtained pursuant to leave reserved that the note was on the face of it made on behalf of the company, and that if it was not so it still bound the company if in fact it was made on its behalf. *Lindus* v. *Melrose* (*r*), which was not before the court in *Gray* v. *Roper* (*s*), was cited in support of the argument. Mr. Justice Willes distinguished the former case on the [★ 231] ground that the question ★ there was whether the words "on account of" were equivalent to "on behalf of." Chief Justice Bovill thought that while the present case was distinguishable from *Lindus* v. *Melrose*, it was undistinguishable from *Gray* v. *Roper*.

SECT. 8.—*Bought and Sold Notes—Summary of Rules.*

The contract may be explained by usage.—(a.) The material question is, What is the intention expressed in the contract? Whether an alleged principal is an Englishman or a foreigner resident abroad is in itself immaterial (*t*). This must be taken subject to what is said upon the question whether an agent has implied authority to pledge his foreign principal's credit (*u*). This intention is in all cases capable of being explained by a custom or usage of trade, when

(*p*) L. R., 4 Ex. 105.
(*q*) 16 L. T. 562.
(*r*) 2 H. & N. 293; 3 H. & N. 177.
(*s*) L. R., 1 C. P. 694; *supra*, p. 228.
(*t*) Mahoney *v.* Kekulé, 14 C. B. 390; Green *v.* Kopke, 18 *ibid.* 549.
(*u*) See Armstrong *v.* Stokes, L. R., 7 Q. B. 605.

any such can be shown to exist (*v*), provided such custom or usage is not inconsistent with the written contract (*x*).

Absence of words importing agency.]—(b.) If the contract is signed without the use of any words importing agency, the person so signing is by virtue of the contract both entitled and liable, unless in the body of the contract a contrary intention is clearly shown (*y*). The accuracy of this principal is not affected by the doubt thrown on the decision in *Gadd* v. *Houghton* (*z*), where the Court of Appeal expresses an opinion differing from that adopted by the Court of Exchequer.

How agent may avoid liability.]—(c.) An agent, then, may free himself from personal liability either by signing as agent (*a*), or by using in the body of the contract words importing agency (*b*). If, however, the principal is not disclosed the agent may be himself liable (*c*) by a usage of trade.[1]

Chronological summary of cases.]—The following cases have been arranged in chronological order, and thus show the development of this branch of law.

★ *Green* v. *Kopke* (*d*), 1856, was an action brought [★ 232] against the agent of a merchant at Gothenburg, to recover damages for the breach of a contract for the sale of a quantity of tar. At the trial it appeared that the contract was made by means of bought and sold notes. The bought note ran thus:

"Bought through Mr. H. Kopke, of Mr. Leonard Roos, Gothenburg," &c. And the sold note: "Sold on behalf of Mr. Leonard Roos, Gothenburg," &c. Signed "H. Kopke, as agent."

The defendant contended that as the contract plainly expressed that he was dealing as agent for a principal named, he was not personally liable, though the principal was a foreigner.[2] Alderson, B., reserved the point for the opinion of the court, and a verdict was

(*v*) Green *v.* Kopke, *supra.*
(*x*) Humfrey *v.* Dale, 7 E. & B. 266; E. B. & E. 1004; Fleet *v.* Murton, L. R., 7 Q. B. 126.
(*y*) *Per* Kelly, C. B., in Paice *v.* Walker, L. R., 5 Ex. 173.
(*z*) 1 Ex. Div. 357.
(*a*) Fairlie *v.* Fenton, L. R., 5 Ex. 169.
(*b*) Gadd *v.* Houghton, *supra*; and see Sharman *v.* Brandt, L. R., 6 Q. B. 720.
(*c*) Humfrey *v.* Dale, *supra.*
(*d*) 18 C. B. 549; 25 L. J., Q. B. 274.

[1] A written contract made by brokers on behalf of undisclosed principals for the sale of hides provided that "if any difference or dispute shall arise under this contract it is hereby mutually agreed between the sellers and the buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers." Evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own case. Barrow *v.* Dyster, 13 Q. B. D. 635 (1884).

[2] As to who is an agent of a foreign corporation so as to be served with process. See Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

found for the plaintiff. This verdict was subsequently set aside by the Court of Common Pleas without calling upon the defendant's counsel. Referring to the case of *Mahoney* v. *Kekuhe* (*e*), Chief Justice Jervis remarked, "We have in effect decided that it makes no difference whether the principal be an Englishman or a foreigner resident abroad; in either case it is equally a question of intention. This is now settled law." In this view of the law there could be no doubt that the defendant was not personally liable. The intention is in all cases capable of being explained by the custom or usage of trade when any such can be shown to exist (*f*).

Humfrey v. *Dale* (*g*), 1858, is a leading case. This was an action for the non-acceptance of a quantity of linseed oil. The defendant's London brokers, being employed to buy oil for their principal, gave to the vendors a note, of which the material part was as follows: "Sold this day for Messrs. Thomas and Moore to our principals, ten tons of Linseed oil.—Dale, Morgan & Co., brokers. Quarter per cent. brokerage to D., M. & Co." At the trial it was proved that the defendants did not disclose the name of their principal at the time of entering into the contract; and the plaintiffs gave evidence that, according to the usages of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. A verdict was taken for the plaintiff, leave being reserved to move to enter a non-suit. Practically two objections were taken to the verdict—namely, that [★ 233] there was no ★ evidence of the contract of sale and purchase; and that evidence of the custom was not admissible. The first objection was mainly one of fact, and soon disposed of. The judgment of the court was delivered by Lord Campbell, C. J. In dismissing the second objection his Lordship went on to say, "The truth is, that the principal on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, *if expressed in the written contract*, would make it insensible or inconsistent." The custom objected to here, if incorporated into the contract, would read thus: "Sold . . to our principals, ten tons of linseed oil. If we do not disclose their names within a reasonable time you may treat us as the purchasers." The rule was discharged.

On appeal to the Exchequer Chamber, a majority of the judges,

(*e*) 14 C. B. 390.
(*f*) *Ibid*, 559.
(*g*) 7 E. & B. 266; affirmed, E. B. & E. 1004.

consisting of Chief Justice Cockburn, Chief Baron Pollock, and Justices Williams and Crowder, affirmed the judgment of the court below, a minority, consisting of Justice Willes, Barons Martin and Channell, dissented. The chief contention in favour of the appellants was, that there was no writing to satisfy the Statute of Frauds. "If this argument were well founded," said Mr. Justice Williams, "it would go to prove that the Statute of Frauds excludes parol evidence to show that one or both the contracting parties to an agreement for the sale of goods were agents for other persons, and acted as such in making the contract." It has been settled (*h*) that such evidence is admissible, so as to give the benefit of the contract to the unnamed principal, or to charge him with liability. So parol evidence has been admitted to show that he who, on the face of the contract, appears to be the agent of an unnamed principal is, in truth, himself the principal (*i*).

★ In *Reid* v. *Dreaper* (*k*), 1861, the defendant had en- [★ 234] tered into the following contract with the plaintiffs:—"From J. D., corn broker. I have this day sold to you two cargoes of French maize . . . payment in London less sixty days' interest and 1 per cent. brokerage. Mr. J. Walker, of London, will send contracts." Walker forwarded contracts on the following day for the two cargoes, on behalf of T., of Bordeaux, the owner of the maize, but he omitted the stipulation as to the brokerage. The plaintiffs objected, and the defendant said he would write to Walker. In order, however, to obtain the cargoes, the plaintiffs were afterwards compelled to pay the value without any deduction for brokerage. Upon these facts the assessor of the Court of Passage at Liverpool nonsuited the plaintiffs in an action to recover the amount of the brokerage. A rule *nisi* having been granted to enter a verdict for the plaintiffs, the Court of Exchequer made it absolute. "If the defendant had authority to sell in the way in which he did," said Baron Wilde, "T. was his principal, but undisclosed. When the principal was disclosed the plaintiff might have had an option, if the maize was not delivered or the contract otherwise not performed, to sue either the principal or the agent. The defendant was either authorized to make the contract or not. If he was authorized . . . the plaintiffs might have sued him at their election. If not, the defendant was liable for having assumed to make a contract for his principal which he had not authority to make. Therefore, I think that the defendant would have been liable on either branch of this contract, viz. as well for a failure to deliver the maize as for the breach of his agreement that written contracts should be sent by Walker." The question whether the plaintiffs' retention of the contracts sent by Walker varied the defendant's liability was not

(*h*) Wilson *v.* Hart, 7 Taunt. 295.
(*i*) Schmalz *v.* Avery, 16 Q. B. 655; Carr *v.* Jackson, 7 Ex. 382.
(*k*) 6 H. & N. 813; 20 L. J., Ex. 208.

raised by the pleadings, but both Baron Martin and Baron Bramwell expressed an opinion in the negative.

Paice v. *Walker* (*l*), 1870, was an action for the non-delivery of wheat according to sample. The defendants signed a contract for the sale of wheat in the following form:—"Sold to A. T. Paice (the plaintiff), London, about 200 quarters of wheat (as agents for John Schmidt & Co., of Danzig) signed, Walker & Strange." [★ 235] ★ At the trial a verdict was entered for the plaintiff. A rule to move to enter a nonsuit was granted, but discharged on the ground that the defendants were personally liable. The rule in cases of this description was thus given by Kelly, C. B.: "Where a contract is signed by a person without any words importing agency, the person so signing is, by virtue of the contract, both entitled and liable, unless in the body of the contract a contrary intention is clearly shown." And he goes on to say, "The contract before us is so signed, and there is nothing tending to show a contrary intention, except words which, on the authority of decided cases, have not that operation." The cases here referred to are those similar to *Lennard* v. *Robinson* (*m*), which have been already noticed. *Fairlie* v. *Fenton* (*n*) was distinguished on the ground that the plaintiffs there signed as brokers (*o*).

In *Fairlie* v. *Fenton* (*p*), 1870, the note was in the following form:—"I have this day sold you on account of . . . Signed, E. F., broker." The Court of Exchequer held that the broker was not a contracting party, and therefore had no right of action against the defendants for breach of the contract in refusing to accept the cotton. Here the plaintiff described himself as broker, and named his principal. Martin, B., pointed out that in Hammond on Parties, in Chitty on Pleading (vol. 1. p. 8), and in Lush's Practice (3rd. edit. p. 11), it is wrongly stated that a broker can sue in his own name. *Humfrey* v. *Dale* (*q*) was followed by *Fleet* v. *Murton* (*r*), 1871. In that case an action for non-acceptance of goods was brought against the defendants, brokers, upon the following contract:—"We have this day sold for your account to our principal . . . tons of raisins. Signed, M. & W., brokers." Evidence that in the London fruit trade it was customary, if the brokers did not name their principal in the contract, to hold them personally liable was admitted, on the authority of *Humfrey* v. *Dale* (*s*), as not being inconsistent with the written contract. "I take it," said Blackburn, J., "that there is no doubt at all in principal, that a

(*l*) L. R., 5 Ex. 173. See Hough *v.* Manzanos, 4 Ex. D. 104.
(*m*) 5 E. & B. 125; 24 L. J., Q. B. 52.
(*n*) L. R., 5 Ex. 169.
(*o*) But see Gadd *v.* Houghton, *supra*; and The Concordia, &c. *v.* Squire, 34 L. T. 825.
(*p*) *Ubi supra.*
(*q*) 7 E. & B. 266.
(*r*) L. R., 7 Q. B. 126.
(*s*) 7 E. & B. 266; E. B. & E. 1004.

broker as such, merely dealing as broker and not as purchaser of the article, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller, and that, ★ consequently, where the contract, as in the [★ 236] present case, in terms says 'sold to A. B.' or 'sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods; he is simply the broker making the contract; . . . but then there comes the evidence of custom. . . . The custom is, that if the broker does not disclose his principal's name on the contract he is personally liable. The custom did not go to the extent, and there is not the slightest ground for saying that the custom went to show that the principal was not liable also, or that the principal was discharged. It is simply this, that if the broker did not name the pridcipal in his contract he incurred a personal liability."

In *Sharman* v. *Brandt* (*t*), 1871, the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, held that where a broker made and signed a contract note thus:—"Bought for Messrs. B. & H. of our principals 200 tons of hemp. W. S. and Co." he could not sue as principal.

Southwell v. *Bowditch* (*u*), decided in 1876, was an action against a broker on a contract of sale. The contract relied on was a sold note, of which the material part was as follows:—"I have this day sold to your order and for your account to my principals, about five tons of pressed anthracene.—W. A. Bowditch." There was no proof of usage to render a broker personally liable upon such a contract. A verdict was entered for the plaintiff, and a rule obtained pursuant to leave reserved to enter a nonsuit was discharged by a court consisting of Lord Coleridge, Justices Grove and Denman. The questions raised by the court for decision were, first, was the document here a contract of purchase? and secondly, what is its effect? The court was unanimous in holding that the sold note was a contract of purchase, and not merely a record for the information of the principal of the manner in which his instructions had been carried out, and that it bound the defendant upon the authority of reported cases. The Chief Justice thought the former question disposed of by *Humfrey* v. *Dale* (*v*), and the latter by *Paice* v. *Walker* (*x*). Considerable doubt has, however, been thrown upon the authority of *Paice* v. *Walker* (*y*), by the ★ Court of Appeal, in [★ 237] *Gadd* v. *Houghton* (*z*). The latter case was an action for the non-delivery of oranges. The defendants, fruit brokers, sent the plaintiff the following note:—"We have this day sold to you on account

(*t*) L. R., 6 Q. B. 720.
(*u*) L. R., 1 C. P. Div. 100; in error, *ibid.* 374.
(*v*) E. B. & E. 1004; 27 L. J., Q. B. 390.
(*x*) L. R., 5 Ex. 173.
(*y*) *Supra.*
(*z*) 1 Ex. Div. 357.

of M. & Co., 2,000 cases of oranges.—J. C. Houghton & Co.[1] The court, consisting of Lords Justices James and Mellish, Baggalay (Justice of Appeal), and Justices Quain and Archibald, held reversing the decision of the Exchequer Division, that the words "on account of," showed an unmistakable intention that the defendants should not be personally liable. The learned judges likewise expressed an opinion that they should have interpreted the expression "as agents for," in *Paice* v. *Walker*, to mean the same thing as "on account of," and should, therefore, have held Walker not liable.[1]

Effect of entries in brokers' books.]—The mode in which brokers should execute their authority in bought and sold notes having been dealt with, there remains to be considered the authorities relating to the effect of entries in the broker's books, as well as the effect of the bought and sold notes. These authorities present as great a conflict perhaps as is to be found in any branch of English law. Isolated *dicta* may be found in support of positions which are quite opposed to each other. The following cases illustrate the various views that have prevailed:—

Lord Ellenborough ruled in 1809, in *Heyman* v. *Neale* (*a*), that an entry by a broker in his book of a sale, signed by him, is a binding contract between the parties, and that the bought and sold note, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract. The action was for not accepting a quantity of hemp. "After the broker has entered the contract in his book, I am of opinion," said his lordship, "that neither party can recede from it. The bought and sold note is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the bought and sold note is only a copy of the other, which would be valid and binding although no bought or sold note was ever sent to the vendor or purchaser. The broker is equally liable on this [★ 238] case as if he ★ had signed the entry in the broker's book with his own hand." The plaintiff, however, was nonsuited upon another point.

The plaintiffs in *Powell* v. *Divett* (*b*), 1812, offered in evidence a note signed by the broker, the entry in his book not having been signed. He was, however, nonsuited on the ground that he had made an alteration in the note.

(*a*) 2 Camp. 337.
(*b*) 15 East, 29.

[1] By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton seed cake of a specified quality. The defendants signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principal. The cargo proved to be of inferior quality. An action was brought against the defendants who were held personally liable on the contract. Hutcheson v. Eaton, 13 Q. B. D. 861 (1884).

In *Thornton* v. *Kempster* (*c*), decided in 1814, the broker negotiated a sale of hemp, but by mistake delivered to the parties bought and sold notes differently describing the contract as Riga Rhine hemp and St. Petersburg clean hemp. Chief Justice Gibbs ruled, in an action for non-acceptance, that there was no mutuality, and the ruling was upheld by the court on the ground that the contract must be on the one side to sell, and on the other to accept, one and the same thing. No other evidence of the contract appears to have been offered.

Chief Justice Gibbs ruled, in a case decided in 1816 (*d*), that if a broker delivers a different note of the contract to each party contracting, there is no valid contract, and mentioned his belief that the case which decides the entry in the broker's book to be the original contract had been contradicted. It does not appear from the report that there was an entry in the broker's book, or that any evidence besides the notes was offered. No such case as that mentioned is to be found in the reports.

In *Thornton* v. *Meux* (*e*), which was decided in 1827, there was a variance, and plaintiff's counsel proposed to show the entry in the broker's book as evidence to prove which of the two notes was correct. To this it was objected, that although it is the duty of the broker to enter the contract in his books for the convenience of the parties, the notes are what bind them, and if the notes vary from the book, the parties are only bound by what they receive. Chief Justice Abbott refused to admit the evidence, remarking that he had changed the opinion he had formerly held, namely, that the broker's book was the proper evidence of the contract. This case is sometimes cited to show that the original contract is not contained in the broker's book; but this ruling does not proceed from the judgments that had lately preceded it—it avows a late change of opinion; it was not acted on in the case so as to nonsuit the plaintiff, but the trial proceeded, and the plaintiff was non-suited on another ★ ground, therefore there was no opportunity [★ 239] to review the ruling in banc (*f*). The plaintiff in *Grant* v. *Fletcher* (*g*) proved a verbal contract of purchase by the broker, and, to comply with the statute, gave in evidence an unsigned entry in the broker's book, and imperfect bought and sold notes. A nonsuit was supported on the ground that the notes did not constitute a sufficient memorandum in writing within the statute. In the judgment it is stated that the entry in the broker's book is the original, and the bought and sold notes ought to be copies of it; and, further, that a valid contract may probably be made by perfect notes, signed by the broker, and delivered to the parties, although the book is unsigned.

(*c*) 5 Taunt. 786.
(*d*) Cumming *v.* Roebuck, Holt, 172.
(*e*) Moo. & M. 43.
(*f*) Per Earle, J., Sievewright *v.* Archibald, *ubi infra*.
(*g*) 5 B. & C. 436.

In *Goom* v. *Aflalo* (*h*), 1826, the entry in the broker's book was not signed, whereas the bought and sold notes were properly signed. "A signed entry in the broker's book," observed Chief Justice Abbott, by whom the judgment of the court was delivered, "and signed notes conformable to each other delivered to the parties, are spoken of as making a valid contract; the entry in the book has been called the original, and the notes copies, but there is not any actual decision that a valid contract may not be made by notes duly signed, if the entry in the book be unsigned; and in one case the late Lord Chief Justice Gibbs is reported to have spoken of some supposed decision to that effect as having been overruled." The objection that the entry in the book was the original, and that the notes were consequently inadmissible, was overruled only after argument on a special case. The inference to be drawn from this is, that the court was still far from recognizing the doctrine that the bought and sold notes constituted the original contract (*i*).

The signature in the broker's book has been held not to be essential to the validity of the contract, on the ground that a rule making such a signature essential would be followed by serious inconvenience, since the validity of the contract would then depend upon some private act, of which neither of the parties to the contract would be informed, and it would thus be in the power of a negligent or fraudulent man to render the engagements of parties valid or [★ 240] invalid at his pleasure (*j*). In ★ *Hawes* v. *Forster* (*k*), decided in 1834, there was a memorandum signed in the broker's book. There were also bought and sold notes tallying with each other, but varying from the book. On the first trial, Lord Denman ruled that the bought note, produced by the buyer, the plaintiff, was sufficient, and was the proper evidence of the contract, and not the book, and that no notice to produce the sold note need be given to the defendant. The court granted a new trial, holding that this evidence was not the proper evidence of the contract, unless there was a custom of trade that the bought and sold notes, and not the signed broker's book, were the contract. This is the explanation of the case given by Baron Parke in *Thornton* v. *Charles* (*l*), and in *Pitts* v. *Beckett* (*m*), and by Mr. Justice Patterson in *Sievewright* v. *Archibald* (*n*). On the new trial, the jury found the custom that the notes, and not the broker's book, constituted the contract. A bill of exceptions was tendered, but the defendant did not proceed with the matter to argument. "Possibly," observed Mr. Justice Patteson (*o*), "if he had, it might have been held that the bought and sold notes acquiesced in constituted a new contract; but that

(*h*) 6 B. & C. 117.
(*i*) Per Erle, J., Sievewright *v.* Archibald, *ubi infra.*
(*j*) *Ubi supra.*
(*k*) 1 Moo. & Rob. 368.
(*l*) *Infra.*
(*m*) 13 M. & W. 743, 746.
(*n*) 20 L. J., Q. B. 529; 17 Q. B. 103, 115.
(*o*) *Ibid.*

they could ever be treated under such circumstances as the original contract seems to me impossible." The verdict may well be supported on the facts of the case, as the acceptance of the notes without objection was evidence for the jury of mutual assent to a contract, upon the terms expressed in those writings which agreed (*p*).

Thornton v. *Charles* (*q*), in the year 1842, was an action for tallow sold and delivered. The bought note described the transaction as a purchase of fifty casks, the sold note as a sale of 200 casks. In the broker's book, the sale was entered as fifty, the remainder of the 200 being allotted to other purchasers. The fifty casks were never actually delivered to the defendant. It was objected to on this evidence that the plaintiff ought to be non-suited on the grounds, first, that as there was a variance between the bought and sold notes, the entry in the broker's book not being admissible, no valid contract had been proved; and secondly, that there was no evidence to show any delivery of the fifty casks to the defendant. The broker, in a conversation with ★ the defendant had offered [★ 241] to "put off" those fifty casks. "Whether enough has been done to satisfy the Statute of Frauds," observed Mr. Baron Parke, "is a point that we need not discuss at present. But I apprehend it has never been decided that the note entered by the broker in his book, and signed by him, would not be good evidence of the contract so as to satisfy the Statute of Frauds, there being no other. The case of *Hawes* v. *Forster* underwent much discussion in the Court of King's Bench when I was a member of that court, and there was some difference of opinion amongst the judges . . Certainly it was the impression of part of the court, that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract. The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents, having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of these notes." Lord Chief Baron Abinger adhered to his opinion that when the bought and sold notes differ materially from each other, there is no contract, unless it is shown that the broker's book was known to the parties. The case was sent for new trial to determine the meaning of the expression "put off."

In *Townend* v. *Drakeford* (*r*) 1843, there was a material difference between the bought and sold notes. No mention is made of any entry of the sale in the broker's book. Lord Denman ruled that there was no contract.

Hullock, B., said, in *Henderson* v. *Barnewall* (*s*): "Bought and

(*p*) See per Erle, J., Sievewright *v.* Archibald, *ubi supra*, and Parke, B., *ubi supra*.
(*q*) 9 M. & W. 802.
(*r*) 1 C. & K. 20.
(*s*) 1 Y. & J. 387.

sale notes are not essential to the validity of the contract; the entry signed by the broker is alone the binding contract" (*t*).

In *Pitts* v. *Beckett* (*u*), 1845, two parties agreed to make a contract. They employed a broker to draw it up. In doing so he omitted a stipulation agreed upon without communicating with the parties. The vendee refused to be bound, and the court held that he was not liable. "The parties meet and enter into a contract," said Mr. Baron Rolfe, "and they authorize another to draw it up, [★ 242] and he behind the back of one of them ★ draws up a different contract and never communicates to him that he has done so. Surely that cannot bind him?"

The Court of Common Bench held, in *Parton* v. *Crofts* (*x*), 1864, that in an action for non-acceptance the sold note is a memorandum sufficient to satisfy the requirements of the 17th section of the Statute of Frauds. The proposition to be inferred from *Hawes* v. *Forster* (*y*) in conjunction with this case is, that where one of the notes only is put in, the court will assume that to be a true representation of the contract between the parties, in the absence of proof that the other contained different terms.

An action was brought in *Sievewright* v. *Archibald* (*z*), which was decided in 1851, for non-acceptance of pig iron. At the trial, before Lord Campbell, the bought note was produced. It differed materially from the sold note, and there was no signed entry in the broker's book. The jury found that the defendant had ratified the contract in the terms stated in the bought note. A rule to set aside the verdict and enter it for the defendant was argued before Lord Campbell and Justices Erle, Patteson, and Wightman. Mr. Justice Erle differed from the majority of the court, who ordered a nonsuit to be entered.

This case is of great importance, from the fullness with which the learned judges entered into the questions connected with the entry in the broker's book, and the bought and sold notes. The following propositions may be gathered from the judgments of the majority:

(a.) Where there has been an entry of the contract by the broker in his book signed by him, this entry in the binding contract between the parties, and a mistake made by the broker, when sending a copy of it in the shape of a bought or sold note, will not affect its validity. Being authorized by one to sell and the other to buy, in the terms of the contract, when he has reduced it into writing, and signed it as their commission agent, it binds them both, according to the Statute of Frauds, as if both had signed it with their own hands.

(*t*) Heyman *v.* Neale, *supra;* Grant *v.* Fletcher, 5 B. & C. 436.
(*u*) 13 M. & W. 743.
(*x*) 16 C. B., N. S. 11. (*y*) *Supra.*
(*z*) 20 L. J., Q. B. 529; 17 Q. B. 103.

(b.) Where there is no entry in the book, or where the entry is unsigned, evidence of the contract is contained in ★ the bought and sold notes, which, however, in [★ 243] order to be binding upon the parties, must agree in substance. If there is a material variance between them, they are both nullities.

(c.) Where there is an entry in the book, as well as bought and sold notes, which differ from the entry but agree *inter se*, the notes cannot be treated as the original contract, though they may afford evidence for a jury of a new and substituted contract according to their terms.

(d.) Where one note only is produced, it will be presumed to contain the contract ; but this presumption may be rebutted by production of the other, and showing a variance.

With respect to the effect of a custom, it has been decided that, if goods in the city of London are sold by a broker to be paid by a bill of exchange, the vendor has a right within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract. But the vendor must intimate his dissent as soon as he has had an opportunity to inquire into the solvency of the purchaser (*a*). Five days have been considered too long a period (*b*). Lord Ellenborough was at first inclined to think that the contract concluded by the broker must be absolute, unless his authority was in writing, of which the purchaser had notice; but the jurymen remarked that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser and annulling the contract. His lordship allowed that the usage was reasonable and valid, and required no further proof (*b*).

Mr. Benjamin, in his valuable work on the Sale of Personal Property (pp. 208—210), summarises the authorities in the following manner:—

First. The broker's signed entry in his book constitutes the contract between the parties, and is binding on both.[1]

Secondly. The bought and sold notes do not constitute the contract.

Thirdly. But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete ★ and [★ 244] sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or what is equivalent, only an unsigned entry.[2]

Fourthly. It seems that either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note.

(*a*) Hodgson *v.* Davies, 2 Camp. 530. (*b*) *Ibid.*

[1] Peltier *v.* Collins, 3 Wend. (N. Y.) 459; Newberry *v.* Wall, 84 N. Y. 576.
[2] See Davis *v.* Shields, 26 Wend. 339.

Fifthly. Where one note only is offered in evidence, the defendant has the right to offer the other note, or the signed entry in the book, to prove a variance.

Sixthly, as to variance. If there be a signed entry, it follows from the first proposition that this entry will in general control the case, because it constitutes the contract, of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a contract modifying that which was entered in the book.

Seventhly. If the bought and sold notes vary, and there is no signed entry showing the terms of the bargain in the broker's book, there is no valid contract.

Eighthly. If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapprove.

It will be observed that these propositions, with the exception of the last, which is supported by *Hodgson* v. *Davies* (*e*), are contained in the judgment of the majority in *Sievewright* v. *Archibald* (*e*).

SECT. 4.—*Charter-Parties not under Seal.*

Agent may execute so as to be liable.]—In a charter-party, as in [★ 245] every contract, if the agent chooses to make himself a ★contracting party, the other contracting party may either sue the agent who has himself contracted, though on behalf of another, or he may sue the principal who has contracted through his agent. He may do so whether the principal was known at the time or not. This right is independent of any remedy acquired by a stipulation for a lien or otherwise over the goods (*f*). This, however, does not prevent an agent from stipulating in the charter-party that his liability shall cease under the contract after a certain time, or upon the happening of a certain event (*g*).

Mode in which Agent may execute.]—An agent may execute a charter-party in any of the following ways:—

(*e*) 2 Camp. 530.

(*f*) *Per* Blackburn, J., in Christoffersen *v.* Hansen, L. R., 7 Q. B. 513.

(*g*) Pederson *v.* Lotinga, cited L. R., 7 Q. B. 510; see the cases quoted in Christoffersen *v.* Hansen, *supra.*

(1.) He may describe himself as agent of a named principal. In this case his liability or non-liability upon the contract is is a question of construction and intention (*h*).

(2.) Assuming, however, that he has authority, if he executes it in the name of his principal, and signs *per proc.*, his execution of the instrument will bind the principal but not himself.

In order to be free from any chance of incurring personal liability, the agent should not only in signing the contract use words importing agency, but he should show in the body of the instrument that he is not a contracting party (*i*).

(3.) Where an agent describes himself in the body of the instrument as an agent for his principal, he will not be protected if he signs the contract in his own name simply.

Agent liable if he contracts in his own name, though he signs as agent.]—Agents have been held liable who have described themselves as signing "on behalf of N." (*j*), "by authority of and as agents of," &c. (*k*); so the form "A. B., agent of C. D.," is held to be a mere description, and not necessarily an execution for a principal (*l*). The law is quite clear that if a man cove-★ nants in his own name on behalf of another, he is liable [★246] on his covenant; and if he promises in the same manner, he is liable upon his promise in *assumpsit* (*m*). If the agent contracts in his personal character in the body of the instrument, but uses words importing agency in his signature, he nevertheless makes himself a party to the contract (*n*). It may be questioned whether the principle of *Gadd* v. *Houghton* (*o*) would affect this rule.

The following cases illustrate the above statements:—

In *Kennedy* v. *Gouveia* (*p*), 1823, the defendant, the consignee and agent of a vessel chartered for a specific voyage, entered into an agreement "on behalf of M., merchant of Liverpool," with the captain, describing himself as "consignee and agent" of the ship and cargo. The agreement further stated, "It is witnessed that the said parties agree," &c. The defendant signed the agreement in his own name, without describing himself as agent. An action was brought against the defendant upon the agreement, and the court refused to disturb the verdict entered for the plaintiff.

(*h*) See Lennard *v.* Robinson, 5 E. & B. 125; Downman *v.* Williams, 7 Q. B. 103.

(*i*) Lennard *v.* Robinson *supra*; Deslandes *v.* Gregory, 29 L. J., Q. B. 93; where the principal is undisclosed, see Hutchinson *v.* Tatham, L. R., 8 C. P. 483.

(*j*) Tanner *v.* Christian, 24 L. J., Q. B. 91.

(*k*) Lennard *v.* Robinson, *supra*.

(*l*) Parker *v.* Winlow, 7 E. & B. 942.

(*m*) Per Abbott, C. J., in Kennedy *v.* Gouveia, 3 D. & R. 503.

(*n*) Lennard *v.* Robinson, *supra*.

(*o*) 1 Ex. Div. 357.

(*p*) *Supra*.

In *Parker* v. *Winlow* (*q*), a charter-party, expressed to be made "between A., of the good ship 'Celerity,' and B., agent for C. D. & Son, of Devonport, merchants," to whom the ship was to be addressed, was signed by A. in his own name, and the court was of opinion that he was personally liable as charterer. "The only ground suggested for rebutting his personal liability," said Lord Campbell, "is that he says he is agent for another; but he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as by nomination for C. D. & Son, he might have exempted himself from liability (*r*), but on principle, and on the authorities cited, an agent is liable personally, if he is the contracting party; and he may be so, though he names his principal." This opinion was not necessary to the decision.

Lennard v. *Robinson and Fleming* (*s*), 1855, was an action for demurrage and damages. From a charter-party set out in the declaration it appeared that an agreement was entered into between the plaintiff, owner of the ship then at Geneva, and the defendants, [★ 247] merchants of London, that the ship should proceed ★ to Torrevieja, and there load from the factors of the defendants a cargo "to be brought to and taken alongside at merchants' risk and expense, which the said merchants hereby bind themselves to ship," and should proceed to Memel and deliver on paying freight, "thirty running days to be allowed the said merchants" for loading and discharging, and ten days for demurrage at 4*l.* per day. The charter-party was signed, "By authority of, and as agents for, A. H. S., of Memel, R. and F."

The plaintiff averred in the declaration that A. H. S. was a foreigner residing beyond the seas. To this the defendants pleaded that the agreement was entered into by the authority of and for and on behalf of, and as agents for, A. H. S., and that he was named to and known by the plaintiff as being defendants' principal at the time the agreement was made. To this plea the plaintiff demurred. Judgment was entered for the plaintiff on the ground that the charter-party itself showed that the defendants contracted personally.

Lord Campbell, C. J., did not attach much weight to the fact that the alleged principal was a foreigner; "for," observed his lordship, "a part of the contract was to be performed in Memel, where he resides, and none in England where the defendants reside. But looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract they are contracting parties, and they may well become so 'by authority of, and as agents for,' their employer; that is, he may be made liable

(*q*) 7 E. & B. 942.
(*r*) Stagg *v.* Elliott, 12 C. B., N. S. 373.
(*s*) 5 E. & B. 125.

to them. That, however, does not alter the effect of the instrument." Coleridge and Erle, JJ., were of the same opinion as to the construction of the contract.

In *Cooke* v. *Wilson* (*t*), 1856, the contract was in the following terms for the conveyance of goods:—"It is this day mutually agreed between J. and R. Wilson (the defendants), owners of the ship Jessica, of the first part, and S. J. Cooke, on behalf of the Geelong and Melbourne Railway Company (the plaintiff), of the other part," that the ship should be ready by a given day to take on board certain goods, and should proceed therewith to a place named, and there deliver them; "the rates of freight determined upon by the said parties to this agreement are as under . . . one-third to be paid in London, on receipt of bills ★ of lading, &c., re- [★ 248] mainder by the Geelong and Melbourne Railway Company at Geelong." The agreement was signed, "J. and R. Wilson," "S. J. Cooke." The Court of Common Pleas, consisting of Justices Cresswell and Crowder, held that the plaintiff was personally bound by this contract, and entitled to sue for a breach of it. "*Primâ facie*, when a man signs a contract in his own name," said Mr. Justice Cresswell, "he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him. I find no circumstances of that sort in this case. . . . The plaintiff, residing in London, proposes to make the contract, and he signs it with his own name." Mr. Justice Williams and Mr. Justice Willes were not present during the hearing.

Deslandes v. *Gregory* (*u*), 1860, was another action upon a charter-party. The charter-party was as follows:—"It is this day mutually agreed between G. D. and Son (the plaintiffs), owners," &c., "and Messrs. Gregory Bros. (the defendants), as agents to S. F., of Anamaboo, merchants and charterers, of the other part, that," &c. Signed, "For G. D. and Son, of Jersey, owners, H. G., as agent for S. F. of Anamaboo, Gregory Bros., as agents." The document was on a printed form, the words "merchants" and "charterers" being retained throughout as printed. The Court of Queen's Bench held that the defendants were not personally liable upon this contract.

The judgment of Justice Crompton is clear and concise. "The rule has been well expressed by Lord Ellenborough," said the learned judge, "that person signing a document, if they wish to exclude their own liability, must show that they sign for some other person (*x*). And I agree that if it is left ambiguous on the instrument, it should be construed against the person signing. . . . It was argued that the defendants should have signed 'by procuration,' if they had intended to exclude their own liability; but I think the more natural word to be used by an agent in such a case as the

(*t*) 1 C. B., N. S. 153.
(*u*) 30 L. J. Q. B. 36.
(*x*) See Leadbitter *v.* Farrow, 5 M. & S. 345.

subsequent proviso that the covenantor shall not be personally liable under the covenant is repugnant and void. That principle, however, is not repugnant to a proviso limiting, but not destroying, the personal liability (*n*).

SECT. 5.—*Execution of Powers conferred by the Legislature.*

Geddis v. *Proprietors of Bann Reservoir* (*o*) is an authority with reference to the execution of powers conferred by the Legislature for the particular purpose. Although no action will lie for doing what has been so authorized if it is done without negligence, although it does occasion damage to others, yet an action will lie if it is done negligently. Such is the established rule, and Lord Blackburn pointed out (*p*) that if, by a reasonable exercise of the powers, either given by statute to the promoters or enjoyed at common law, the damage could be prevented, it is negligence within the above rule not to make such reasonable exercise of their powers.

Water bailiff—Salmon Fishery Acts, 1861—73.]—A water bailiff cannot exercise the authorities given him under the Acts mentioned, unless he produces his appointment, whether such production is or is not demanded (*q*).

(*n*) See per Jessel, M. R., Williams *v.* Hathaway, 6 Ch. Div. 514, p. 550.
(*o*) 3 App. Ca. 430.
(*p*) *Ibid.*, p. 456.
(*q*) Padnacott *v.* Passmore, 56 L. J., M. C. 99.

★ BOOK III. [★ 252]

OF THE RIGHTS, DUTIES, AND LIABILITIES ARISING OUT OF THE CONTRACT.

CHAPTER I.

DUTIES OF AGENT—DIGEST OF RULES.

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SECT. 1.—*Duties of agent in general.*

Duties of agent in executing his authority.]—The following sections deal very briefly with rules and principles which will be found more fully discussed in the chapters relating to the authority and liability of an agent.

The principles that should regulate the conduct of each and every agent in the performance of his duty, whatever may be the nature of his agency, are capable of being grouped under a few heads. In other words, there exists a number of general principles common to the whole law of agency so far as it relates to the duties of agents in executing their authority, principles to which may be traced back all those apparently independent rules that seem to be peculiar to the vast variety of forms in which the contract of agency may exist. The rules, then, incumbent upon agents in general are the following:—The agent must be careful

(a.) To perform the duties undertaken:

(b.) To act in the name of his principal:

★ (c.) To act in person: [★ 253]

(d.) To obey instructions and observe the terms of the authority:

(e.) In the absence of instructions to conform to usage or recognized mode of dealing:

(f.) To act in good faith:
(g.) To use reasonable skill and ordinary diligence:
(h.) To make a full disclosure where he has an adverse interest:
(i.) To render full accounts of receipts and disbursements:
(k.) To keep the goods and money of the principal separate from his own:

Performance of duties.]—(a.) As soon as an agent has undertaken to execute a commission for a valuable consideration, he binds himself to perform it, and will be liable for its performance in the absence of a fresh contract releasing him, unless the agreement is either illegal, immoral, or absolutely impossible.[1] As to duty of coroner to hold an inquest, and as to his discretion to delay so doing, see *In re Hall* (*a*).

He should act in name of principal.]—(b.) The reason of the rule which requires an agent to act in the name of his principal is obvious. In so far as he undertakes to act as an agent, he undertakes to represent the principal only. A. agrees to act for B. in the purchase of the estate of C. Here A. contracts that so far as the purchase is concerned he will sink his own personal right of contract, and act merely as a medium for transferring to B. all rights acquired by the contract with C.[2]

(c.) The rule that an agent must act in person is subject to certain exceptions which have already been touched upon in a consideration of the question of delegation of authority.[3]

When performance will be excused.]—(d.) The duty of an agent to obey his instructions and observe the terms of his authority[4] is qualified by the operation of certain well-known principles of law. They are as follows:—

(1.) When the authority or instructions require him to do an illegal or immoral act he will not be justified in doing such act.[5]

(2.) Where a deviation from the strict performance of his author-
[★ 254] ity is due to necessity or to unforeseen emergency, ★ which is itself not due to the agent's default, such deviation is justifiable.[6] This, of course, is true only where the agent is not an insurer, in which case the rule of agency is superseded by a special contract.

(*a*) 9 Q. B. D. 689.

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[1] Allen *v.* Snydam, 20 Wend. 321; Williamsburg, &c. Insurance Co. *v.* Frothingham, 122 Mass. 391.
[2] Sullivan *v.* Ross, 39 Mich. 511.
[3] Connor *v.* Parker, 114 Mass. 331; Lyman *v.* Jerome, 26 Wend. 485, Lock's App. 72 Pa. 491.
[4] Wilts *v.* Morrell. 66 Barb. 511; Persch *v.* Sniggle, 57 Pa. St. 247; Rommel *v.* Wingate, 103 Mass. 327.
[5] Davis *v.* Barger, 57 Ind. 54; Brown *v.* Howard, 14 Johns. (N. Y.) 119.
[6] Dusar *v.* Petit, 4 Binn. (Pa.) 361; Harter *v.* Blanchard, 64 Barb. 617; Greenleaf *v.* Moody, 13 Allen 363.

(3.) If the terms of the authority have been substantially performed a circumstantial variance will be held to be immaterial.[1]

(4.) Where the instructions are ambiguous the agent who acts in good faith on the probable construction is not liable.[2]

Agent instructed to deal with property in a particular way.]—In *Lilley* v. *Doubleday* (*b*), decided in 1881, in which Grove, J., stated the rule of law to be that "if the owner of property gives another person authority to deal with it and points out the particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, whether the injury or destruction is caused by the act of a third party, or, as it is called in law, by the act of God." Hence, where the defendant agreed to warehouse the plaintiff's goods at a place mentioned but warehoused them at another where they were destroyed by fire, he was held liable for the loss (*c*).

Sheriff's officer instructed by telegram.]—When a sheriff's officer received notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted to restrain a sale in the country under an execution, it is his duty to telegraph to the court issuing it, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted (*d*).

A sheriff's officer who is not himself present at a sale which has been restrained by injunction, and who has no notice of the injunction, is not responsible for the act of his deputy, who allows the sale to be continued after receiving notice of the injunction by telegram (*e*).

Where there is a usage.]—(e.) These rules and principles have already been considered at length. When an agent is commissioned to do any act, nothing further being said as to the mode of performance and the like, it will be important for him to consider whether there exists any recognized usage of trade or mode of ★ dealing. The authority and instructions will be in- [★ 255] terpreted as embodying an implied agreement that the usage shall be observed.[3] Here, however, as in other instances where authority is implied from the existence of a custom, the usage must be capable of being coupled with the authority without introducing any inconsistency.

Bonâ fides.]—(f.) Very little need be said of the necessity incumbent upon an agent to act in good faith. The agent's position

(*b*) 7 Q. B. D. 510; 51 L. J., Q. B. 310; 44 L. T. 814.
(*c*) *Ibid.*; and see Davis *v.* Garrett, 6 Bing. 716.
(*d*) *Ex parte* Langley, *In re* Bishop, 13 Ch. Div. 110.
(*e*) *Ibid.*

[1] Parkhill *v.* Imlay, 15 Wend. 431.
[2] Wilson *v.* Wilson, 26 Pa. St. 393; Whitney *v.* Wyman, 24 Md. 131.
[3] Laussatt *v.* Lippincott, 6 S. & R. 392; Delafield *v.* State of Illinois, 26 Wend. 192.

is one of trust, and, as will be seen hereafter, no agent will be allowed to take any advantage of his position to the detriment of his principal.

A majority of the Court of Appeal (Lindley and Lopes, JJ., Lord Esher, M. R., dissenting) reversing the decision of Day, J., held in *Blackburn* v. *Vigors* (*f*), which was decided in 1886, that a policy of marine insurance is vitiated by the concealment of a material fact by a broker employed by the assured to effect an insurance, although he is not the broker through whom the insurance is ultimately affected, and although the assured is innocent of all fraud. The House of Lords reversed the decision of the Court of appeal and restored the decision of Day, J. (*g*).

Skill and diligence required.]—(g.) To say that an agent must use reasonable skill and diligence in the execution of his authority is somewhat vague. The standard of the diligence required in any employment is generally said to be twofold. It may be either that diligence which a man shows in the conduct of his own affairs, or it may be that diligence which is characteristic of a good man of business when engaged in the particular employment. The former has been termed *diligentia quam suis*, the latter *diligentia diligentis patris familiæ*. The one is a standard that varies with each individual, the other has a more fixed and stable character, being that which reasonable men conversant with the particular employment would have no difficulty in determining. This latter is the standard of skill and diligence required of agents. If an agent has authority to employ deputies he will be liable for any negligence in selecting improper persons, but not for the negligence of the deputies themselves. [★ 256] The rule adopted by Mr. Justice Story (*h*) ★ is, that the agent contracts for reasonable skill and ordinary diligence; by the former being understood such skill and no more than is ordinarily possessed and employed by persons of common capacity engaged in the same trade, business or employment; and by the latter that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs (*i*).[1]

Fiduciary relation explained.]—(h.) Wherever two persons stand in such a relation that while it continues confidence is necessarily possessed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his

(*f*) 17 Q. B. Div. 553.

(*g*) W. & N., Aug. 13, 1887, p. 172. See, also, Gladstone v. King, 1 M. & S. 35; Fitzherbert v. Mather, 1 T. R. 12; Proudfoot v. Montefiore, L. R., 2 Q. B. 511.

(*h*) Story on Agency, s. 208.

(*i*) See Book III., Chap. II.

[1] Whitney v. Martine, 88 N. Y. 535; Gheen v. Johnson, 90 Pa. St. 38; Matthews v. Fuller, 123 Mass. 446; Webster v. Whitworth, 49 Ala. 201.

position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed (*k*). This is the general principle. It may not, however, be amiss to give a summary of the principles of fiduciary relations in general:

(1.) An agent will not be allowed to place himself in a position in which his duty and interest are in conflict.[1]

(2.) It is the duty of every agent to do the best he can for his principal; hence he is precluded from taking the benefit of purchasing a debt which his principal is liable to discharge (*l*).

(3.) No agent is permitted to make a secret profit out of the conduct of his agency. Hence, again, if employed to buy, he will not be allowed to sell to his principal at a higher price than he gave himself (*m*).[2]

(4.) Where the known and defined relation exists the conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection. Where, on the other hand, the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired (*n*). The ★ rules with regard to [★ 257] gifts are more secret than those with regard to purchasers.

(5.) Whenever a professional man is called in to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences likely to result, and requires that he should distinctly and clearly point out to his clients all those consequences from which a benefit may arise to himself from the instrument so prepared; and if he fails to do so, he will not be allowed to retain the benefit (*o*). Where it was proved that there was no undue influence, that the grantor was fully aware of the effect of what he was doing, and that the deed was not made without the intervention of a disinterested third person, the court refused to set aside the deed, which was voluntary (*p*).

It will be observed that all these rules are intimately related to one another. They may be all referred to the principal that where

(*k*) Tate *v.* Williamson, L. R., 6 Ch. 61, and cases cited in the chapter on Fiduciary Relations.
(*l*) Reed *v.* Norris, 2 M. & C. 374.
(*m*) See Hitchins *v.* Congreve, 4 Russ. 562.
(*n*) Hunter *v.* Atkins, 3 M. & R. 140.
(*o*) Segrave *v.* Kirwan, Beat. 157.
(*p*) Pratt *v.* Barker, 4 Russ. 507.

[1] Persch *v.* Sniggle, 57 Pa. St. 247; Cook *v.* Berlin Wool Mills Co., 43 Wis. 433; McMillan *v.* Arthur, 98 N. Y. 167; Capener *v.* Hogan, 40 Ohio, 203; Love *v.* Hoss, 62 Ind. 255; Taussig *v.* Hart, 58 N. Y. 425.
[2] Eby *v.* Hanford, 65 Ill. 267; Cutter *v.* Demmon, 111 Mass. 474.

any relation exists by means of which a person is able to exercise a dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can show that the transaction was a righteous one.

Other duties.]—(i.), (k.) As to the other duties of agents, it will be seen, when their liabilities are considered, that an agent can neither refuse to account nor may he mix his principals and his own goods and money with impunity (*q*).[1]

SECT. 2.—*Duties of Particular Classes of Agents.*

Auctioneers.]—The duties of an agent may be varied and modified by contract, but it is none the less convenient to show briefly the application to particular classes of agents of the rules which define the duties of agents in general.

An auctioneer is bound:

(a.) To use reasonable skill and diligence in his business.[2]—In *Denew* v. *Deverell* (*r*), the plaintiff, an auctioneer, had neglected to insert a usual clause in particulars of sale, by reason of which omission the sale was fruitless. The [★258] plaintiff accordingly failed to recover ★ commission, although the particulars were shown to the defendant. "I pay an auctioneer," said Lord Ellenborough, "as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess, and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompense, although from a misplaced confidence I followed his advice without remonstrance or suspicion."

(b.) To sell to third parties, *i. e.* not to purchase himself.[3]—This disability to purchase may continue after the date of the auction. Thus, the Court of Exchequer held, in *Oliver* v. *Court* (*s*), that an auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself; and that if the person so employed has also been in other respects connected with the interests of the vendor, as, for instance, by having been concerned in valuing the property, and purchases the estate next day by private

(*q*) See Book III., Chap. 2.
(*r*) 3 Camp. 451.
(*s*) 8 Price, 127; Dan. 301.

[1] Kerfoot *v.* Hyman, 52 Ill. 512; Riley *v.* State, 32 Texas, 763.
[2] Bodin *v.* McCloskey, 11 La. An. 46; Townsend *v.* Van Tassell, 8 Daly (N. Y.), 261.
[3] Brock *v.* Rice, 27 Gratt. (Va.) 872; Scott *v.* Mann, 36 Texas, 157; see Swires *v.* Brotherline, 41 Pa. St. 135; Same, 48 Pa. St. 68.

contract, the property not having been sold at the auction, the purchase will be set aside. In this case the purchase was set aside after the lapse of more than twelve years. In ordinary cases, however, the disqualification to purchase does not continue after the auctioneer has descended from the rostrum (*s*):

(c.) To sell only for ready money unless otherwise authorized (*t*):[1]

(d.) To keep the deposit until completion of contract (*u*).[2]—An auctioneer is a stakeholder: (*x*)

(e.) To disclose name of his principal (*y*):

(f.) To sell in person, *i. e.* not to delegate his authority (*z*):[3]

(g.) To account to his employer, but not for interest (*a*),[4] unless it was his duty to make investment (*b*):

★ (h.) To keep the goods entrusted to him with the [★ 259] same care that a prudent man would exercise (*c*).—In case of fire, robbery, or other damage due to *vis major* or accident, he is not liable, provided he has been guilty of no default (*d*):

(i.) Lastly, with respect to his duty at sales. An auctioneer should obtain the best price, and not sell for a less price or in a different manner from that specified in his instructions;[5] or, if no instructions are given, from that justified by usage; but if obedience to his instructions would involve a fraud on a third person, he must not obey them, since no contract can oblige a man to make himself the instrument of fraud (*e*).

Bill Brokers.]—As to bill brokers or agents employed in negotiating bills of exchange, such an agent is bound without delay—

(1.) To endeavour to procure acceptance:

(2.) On refusal, to protest for non-acceptance when necessary:

(3.) To advise the remitter of the receipt, acceptance, or protesting; and

(4.) To advise any third person who is concerned (*f*).

(*t*) Williams *v.* Millington, H. Bl. 81.
(*u*) Edwards *v.* Hodding, 5 Taunt. 815; Gray *v.* Gutteridge, 1 M. & R. 614.
(*x*) Burrough *v.* Skinner, 5 Burr. 2639.
(*y*) Peake, 120; Franklyn *v.* Lamond, 4 C. B. 637.
(*z*) Cockram *v.* Irlam, 2 M. & S. 301; Coles *v.* Trecothick, 9 Ves. 251.
(*a*) Harington *v.* Hoggart, 1 B. & Ad. 577.
(*b*) 8 Ves. 72. (*c*) See Coggs *v.* Bernard, 3 Ld. Raym. 917.
(*d*) See Davis *v.* Garrett, 6 Bing. 723; Caffrey *v.* Darby, 6 Ves. 496.
(*e*) Guerreiro *v.* Peile, 3 B. & A. 616; and see Bateman's Law of Auctions, 161.
(*f*) Beawes, 431; Paley by Lloyd, 5.

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[1] As where they have the discretion to sell on credit. Townes *v.* Birchett, 12 Leigh, (Va.), 173.
[2] Ellison *v.* Kerr, 86 Ill. 427.
[3] Com. *v.* Harnden. 19 Pick. (Mass.) 482.
[4] Tripp *v.* Barton, 13 R. I. 130.
[5] Steele *v.* Ellmaker, 11 S. & R. (Pa.) 86; Bush *v.* Cole, 28 N. Y. 261; Broughton *v.* Silloway, 114 Mass. 71.

Mercantile agents.]—The following is given merely as a brief summary of their duties, inasmuch as they are more fully treated elsewhere.

Where the agent's instructions are express, he must obey them in substance, except where they are illegal, in which case performance itself would be wrong (*g*). Where the instructions are general, he must follow the usage and custom, provided that course would not be injurious to his principal, or, in the absence of such usage, act to the best of his judgment and *bonâ fide* (*h*).

With respect to the duty to insure the goods of the principal, the rule is thus stated by Mr. Justice Buller: "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed:

[★ 260] ★ "First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands, when and in what manner he pleases.

"The second class of cases is where the merchant abroad has no effect in the hands of his correspondent; yet, if the course of dealing between them is such, that the one has been used to send orders for insurance and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing.

"Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction" (*i*).

With respect to the other duties of mercantile agents, viz., the duty to account, to keep their principal's money distinct from their own, to act in good faith, to use due diligence and the like, nothing further need be said here.

Master of ship.]—The master of a ship is bound—

(a.) To give all his time to his employer (*k*):

(b.) To accept no interest in conflict with his duty.—Hence he may not make profits in the course of his agency (*k*). But if there is no agreement to the contrary he may claim "primage accustomed," when inserted in the charter-party (*l*).

Ship's husband.]—The ship's husband is bound—

(*g*) Holman *v.* Johnson, Cowp. 341; *Ex Parte* Mather, 3 Ves. 373; Turpin *v.* Bilton, 5 Man. & G. 455; G. W. Ins. Co. *v.* Cunliffe, L. R., 9 Ch. Ap. 525.

(*h*) Comber *v.* Anderson, 1 Camp. 523; Lambert *v.* Heath, 15 M. & W. 486.

(*i*) Smith *v.* Lascelles, 2 T. R. 187.

(*k*) Thomson *v.* Havelock, 1 Camp. 527; Maclach. Mer. Ship. 172.

(*l*) Best *v.* Saunders, M. & M. 208; Scott *v.* Miller. 3 Bing. N. C. 811.

(a.) To select tradesmen and appoint officers without partiality (*m*):
(b.) To see that the ship is properly repaired, equipped and manned (*n*):
(c.) To procure freights or charter-parties (*n*):
(d.) To preserve the ship's papers (*n*):
(e.) To make the necessary entries (*n*):
(f.) To adjust freight and averages (*n*):
★(g.) To disburse and receive moneys, and keep [★ 261] and make up the accounts as between all parties interested (*o*):
(h.) To act in person:
(i.) To account.—If he refuses or delays to do so, he will be be liable to pay interest on the money in his hands (*p*).

His duties are thus summarized in Bell's "Principles of the Law of Scotland," p. 449: "1. To arrange everything for the outfit and repair of the ship—stores, repairs, furnishings; to enter into contracts for affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishing stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money wherewith to pay. 3. He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest without special authority. 5. He cannot give authority to a law agent that will bind his owners for expenses of a law suit. 6. He cannot delegate his authority."

Solicitors.]—A solicitor who accepts a retainer to do any business as solicitor, contracts to carry on the business to its termination, provided the client supplies him with reasonable funds (*q*), viz., such funds as enable the solicitors to proceed with the cause by meeting the expenses as they arise (*r*). His duty is—

(a.) To exercise reasonable skill and diligence in his profession.[1]

The measure of damages recoverable in consequence of a breach of duty by a solicitor is the loss or damage to which the client has been subjected directly by reason of the solicitor's default or neglect.[2] In *Stannard* v. *Ullithorne* (*s*), A., the assignee of a lease, employed B. as an attorney to peruse, on his behalf, the draft of an

(*m*) Card *v.* Hope, 2 B. & C. 661; Darby *v.* Baines, 9 Ha. 372; Abbott, Shipping, 79.
(*n*) Abbott, Shipping, 79.
(*o*) Abbott, Shipping, 79; Sims *v.* Brittain, 4 B. & Ad. 375.
(*p*) Pearce *v.* Green, 1 J. & W. 135, 139.
(*q*) Whitehead *v.* Lord, 7 Ea. 691.
(*r*) Haslop *v.* Metcalf, 1 Jur. 816.
(*s*) 10 Bing. 491.

[1] Watson *v.* Muirhead, 57 Pa. 161; Stevens *v.* Walker, 55 Ill. 151; Walpole *v.* Carlisle, 32 Ind. 415.
[2] Weeks on Attorneys, § 319.

assignment. B. allowed A. to execute an unqualified covenant that the lease was valid (an unusual covenant) without informing him of the consequences. B. was accordingly held liable for such damages as A. had suffered.

It is extremely difficult to define the exact limit by which the [★ 262] ★ skill and diligence which a solicitors undertakes to furnish in the conduct of a case is bound, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible (*t*). Solicitors who undertake to act for a client are presumed to know the duties imposed upon them by Act of Parliament and rules of court, as well as by the ordinary practice and routine of professional duty, and will be liable to their clients for want of such knowledge; but they are not liable for mistakes upon difficult points of law, unless they undertake to act upon their own opinion (*u*). Except in those cases where there is a legal presumption that a solicitor has the requisite knowledge, he may free himself from responsibility by following the advice of counsel (*x*).

Where a solicitor misses a case in the paper which is consequently taken in his absence, the action will be restored to the paper on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. The solicitor will be liable over to the client (*y*).

But the courts have no jurisdiction to order a solicitor to pay the costs of a suit merely because it has been rendered necessary by his having made a blunder (*z*).

Solicitors have been held guilty of actionable negligence:

Where proceedings were taken in a court that had no jurisdiction, which fact was patent (*a*), or before the necessary preliminaries had been observed (*b*); in suffering judgment to go by default (*c*); in failing to deliver brief to counsel in time (*d*); in failing to be present at trial with the witnesses (*e*); where the client's papers have been lost (*f*) or mislaid (*g*).

(b). To observe the utmost good faith and fidelity towards his client.[1]

(*t*) Per Chief Justice Tindal, Godefroy *v.* Dalton, 6 Bing. 467.
(*u*) Kemp *v.* Burt, 1 Nev. & M. 262; Pitt *v.* Zalden, 4 Burr. 2060; Hart *v.* Frame, 6 Cl. & F. 193; Stevenson *v.* Rowland, 2 Dow. & C. 119.
(*x*) Godefroy *v.* Jay, 7 Bing. 413; Bracey *v.* Carter, 12 Ad. & E. 373.
(*y*) Burgoine *v.* Taylor, 9 Ch. Div. 1.
(*z*) Clark *v.* Girdwood, L. R., 7 Ch. Div. 9.
(*a*) Williams *v.* Gibbs, 5 Ad. & E. 208.
(*b*) Hunter *v.* Caldwell, 10 Q. B. 69.
(*c*) Godefroy *v.* Jay, *supra*.
(*d*) Lowry *v.* Guildford, 5 C. & P. 234.
(*e*) Hawkins *v.* Harwood, 4 Ex. 503; Reeve *v.* Rigby, 4 B. & Ald. 203.
(*f*) Reeve *v.* Palmer, 5 C. B., N. S. 91.
(*g*) Wilmoth *v.* Elkington, 1 N. & N. 749.

[1] Weeks on Attorneys, § 268.

★Hence it is his duty to avoid the acceptance of inter- [★ 263] ests conflicting with those of his client, and to advise his client with a due regard to the latter's interest.

If a solicitor lends money to his client he must take from him only a security in the ordinary terms, unless a full explanation is made (*h*).

(c.) To preserve an inviolable secrecy with respect to the communications of his client made to him whilst acting as solicitor, whether the communications relate to an action existing or in progress at the time they are made (*i*).[1]

Provided the communication does not make the solicitor a party to a fraud (*k*), and it is received in the ordinary scope of his professional employment, either from a client, or on his account, or for his benefit in the transactions of his business; or if he commits to paper, in the course of his employment on the client's behalf, matters which he knew only through his professional relation to the client, he is bound to withhold them, and will not be compelled to disclose the information or to produce the papers in any court, either as party or witness, unless the evidence required of him relates only to collateral matters (*l*). The privilege of secrecy, on the ground of professional confidence, extends to business communications between solicitor and client, and solicitor's agent, client's agent and solicitor, and between solicitor and his agent. The practitioner's mouth is shut for ever. The protection does not terminate with the death of one of the parties to it: if the solicitor be-

(*h*) Cockburn *v.* Edwards, 8 Ch. Div. 449; and see Pooley *v.* Whetham, 28 Ch. Div. 38.

(*i*) Cromack *v.* Heathcote, 4 Moo. 357; Clark *v.* Clark, 1 M. & Rob. 3.

(*k*) Gartside *v.* Outram, 26 L. J., Ch. 114.

(*l*) Doe *v.* Andrews, Cowp. 845; and see *per* Lord Brougham, Greenough *v.* Gaskell, 1 My. & K. 98.

[1] "No legal adviser is permitted whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course of, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client, during, in the course of, and for the purpose of such employment . . . It is immeterial whether the client is or is not a party to the action in which the question is put to the legal adviser. This rule does not extend to (1) Any such communication as aforesaid in furtherance of any criminal purpose; (2) Any fact observed by any legal adviser in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not; (3) Any fact with which such legal adviser became acquainted otherwise than in his character as such." Stephens Digest of the Law of Evidence, Art. 115.

Kant *v.* Kessler, 114 Pa. St. 603. Where an attorney-at-law is the legal adviser of both parties, and receives communications from each in the presence of the other, such communications are not privileged from disclosure. Goodwin's Co's. Appeal, 117 *id*, 514.

comes an interested party or ceases to practise it may be enforced by injunction (*m*).

As to the production of letters passing between the solicitor and surveyor of a defendant, and for which privilege is claimed, see *Wheeler* v. *Le Marchant* (*n*). The privilege does not apply unless the letters were prepared confidentially, after the dispute arose, for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated.

[★ 264] ★A pursuivant of the Herald's College is not a legal adviser. Consequently communications between him and his employer are not privileged (*o*).

House agents.]—Where a house agent is to receive a commission for letting a house, it is a question for the jury whether he made reasonable inquiries as to the solvency of the tenant (*p*).

Pilots.]—Although it is true that pilots are not to convert their duties into salvage services, yet no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward, since any person, whether a pilot or not, who takes charge of a vessel in distress with the consent of her master, is entitled to salvage reward, in the absence of an express contract to the contrary (*q*).

(*m*) Hare on Discovery, 2nd ed., p. 163; as to the extent of the privilege, see Fenner *v.* South Coast Rail. Co., L. R., 7 Q. B. 770; Young *v.* Holloway, 12 P. D. 167; Simpson *v.* Brown, and Hampson *v.* Hampson, 26 L. J., Ch. 612; as to its duration, see Chomondley *v.* Clinton, 19 Ves. 268.

(*n*) 17 Ch. D. 675.

(*o*) Slade *v.* Tucker, 14 C. H. D. 824; 49 L. J., Ch. 644.

(*p*) Heys *v.* Tindall, 1 B. & S. 296; 30 L. J., Q. B. 362.

(*q*) The Anders Knape, 48 L. J., Prob. 53; 37 L. T. 684.

★ CHAPTER II. [★ 265]

LIABILITIES OF AGENT TO PRINCIPAL ON CONTRACTS.

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[★ 266] ★SECT. 1.—*Of the Liability generally.*

Liability to principal.]—An agent may be personally liable upon his contracts to his principal or to third parties.

First, then, as to his liability to his principal.

Whenever an agent violates his duties to his principal, he will be liable to indemnify the latter for any loss sustained by him, provided the loss is a natural result of such violation of duty (*a*).

This rule applies wherever the agent, not being a gratuitous agent, neglects to enter upon the performance of what he has undertaken (*b*); or where the agent fails to exercise that degree of skill which is imputable to his situation or employment (*c*); or where he neglects the express instructions of his principal, or duties that may be reasonably inferred (*d*) either from the principal instructions (*e*), or from usage of trade or mode of dealing (*f*); provided the deviation from his duties implied or expressed is not of a slight and unimportant character, or occasioned by a sudden and unforeseen emergency (*g*), or justified by the illegality of the instructions, in which cases the agent will not be liable. The same rule applies where the agent neglects to keep regular accounts (*h*), or to account for profits made in the course of his agency (*i*), or when he mixes the property of his principal with his own (*k*).[1]

Liability to third persons on contracts.]—Where an individual is known to be contracting on behalf of a known principal, he will, as a general rule, incur no personal liability upon such contract (*l*), unless such liability is necessarily implied from his conduct or the form of the contract into which he has entered.[2] An agent may contract orally or in writing. If he contracts orally, his liability or non-liability will depend upon the answer to the question,—to [★ 267] whom was credit given? This is a question ★ of fact (*m*). If the agent acts within the ccope of his authority, and credit is given to the principal alone, the former will incur no personal liability; but if credit is given to the agent alone, or to him and his

(*a*) Paley on Agency, by Lloyd, 9, 10, 16, 17.
(*b*) Elsee *v.* Gatward, 5 T. R. 143.
(*c*) Shiells *v.* Blackburn, 1 H. Bl. 158.
(*d*) Smith *v.* Lascelles, 2 T. R. 187; Wallace *v.* Telfair, 2 T. R. 188, note.
(*e*) Park *v.* Hammond, 4 Camp. 344.
(*f*) *Ex parte* Belchier, Ambl. 218; Moore *v.* Morgue, Cow. 480; Paley, 9.
(*g*) Catlin *v.* Bell, 4 Camp. 183.
(*h*) White *v.* Lady Lincoln, 8 Ves. 363.
(*i*) Rogers *v.* Boehm, 2 Esp. 702; Thomson *v.* Havelock, 1 Camp. 527; Turnbull *v.* Garden, 38 L. J., Ch. 331.
(*k*) Rogers *v.* Boehm, *supra*; Travers *v.* Towsend, 1 Bro. Ca. Ch. 384; Caffrey *v.* Darby, 6 Ves. 496; Wren *v.* Kirton, 11 Ves. 377, 382; Drake *v.* Martyn, 1 Beav. 525.
(*l*) Paterson *v.* Gandasequi, 15 East, 62; *Ex parte* Hartop, 12 Ves. 352.
(*m*) Scrace *v.* Wittington, 2 B. & C. 11; Iveson *v.* Connington, 1 B. & C. 160.

[1] For American cases see Book III. Chap. 1, § 1.
[2] Campbell *v.* Baker, 2 Watts (Pa.), 83; Whitman *v.* Wyman, 101 U. S. 392; Haight *v.* Sohler, 30 Barb. 219.

principal jointly, he will be personally liable (*n*). If the agent contract in writing or under seal, his liability or non-liability will, as a general rule, depend upon the true construction of the writing, though a *primâ facie* liability upon a written instrument may in certain cases be rebutted (*o*).[1]

If a principal has entrusted goods to his agent for sale, and that agent wrongfully raises money upon such goods, the principal is at liberty, at any time after he discovered the fact, in taking the accounts between himself and his agent, to abandon the goods altogether, and to treat the money so raised as money had and received to his own use.

This principle was carried to its full extent by the House of Lords in 1834, in the case of *Keating* v. *Marsh* (*p*). From the facts set out in a special verdict, it appeared that one Fauntleroy, a partner in a banking house, transferred stock belonging to the plaintiff by a forged power of attorney. The proceeds were paid to the account of the partnership, and afterwards appropriated by Fauntleroy, who was subsequently executed for other forgeries. The other partners (the defendants) were ignorant of the transaction, but with common diligence would have known it. The Court of King's Bench gave judgment for the plaintiff. This judgment was affirmed by the Exchequer Chamber, whose judgment was itself affirmed by the House of Lords, the judges having been first summoned. In delivering the unanimous opinion of the judges who were summoned, Mr. Justice Park examined in order the several objections raised to the plaintiff's right to recover, one of which was that the proceeds of the sale of the stock never came into the hands of the defendants so as to be money received by them to the use of the plaintiff. The objection was held to be untenable, as the money had actually come into the possession of the defendants; and, secondly, as the defendants had the means of knowing, whilst it remained in their hands, that it was the plaintiff's money. Tindal, C. J., ★ delivering the judgment of the Court of Common [★ 268] Pleas in a subsequent case (*q*), said: "We conceive, on the principle laid down in *Marsh* v. *Keating* (*r*), that Messrs. Bonzi were at liberty, at any time when they found their factors had wrongfully raised money on their goods, in taking the accounts between themselves and their factors, to abandon their goods altogether, and to treat the money so wrongfully borrowed by the factors on the pledge of the goods as money had and received to the use of themselves."

(*n*) *Ex parte* Hartop, *supra*.
(*o*) See Wake *v.* Harrup, 1 H. & C. 202; and Lindus *v.* Bradwell, 5 C. B. 583.
(*p*) 1 M. & Ayr. 582.
(*q*) Bonzi *v.* Stewart, 5 Scott, W. R. 1.
(*r*) *Supra*.

[1] Woodes *v.* Bennett, 9 N. H. 55; Ballou *v.* Talbot, 16 Mass. 461; Chipman *v.* Foster, 119 Mass. 189; Bank *v.* Dix, 123 Mass. 148; Rice *v.* Gove, 22 Pick. 158.

A del credere *agent not responsible in the first instance.*]—In *Morris* v. *Cleasby* (*s*), 1816, Lord Ellenborough said: "Lord Mansfield is made to say, in *Grove* v. *Dubois* (*t*), that a communication *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance, that there is no occasion for the principal to communicate with the underwriter, though the law allows the principal for his benefit to resort to him as a collateral security. . . . With all the respect which is due to Lord Mansfield and those judges in *Houghton* v. *Matthews* (*u*), we cannot accede to those propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situation of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law."[1]

Unforeseen circumstances.]—An agent who is prevented performing his agency by an unforeseen circumstance should give notice of the fact to his principal (*x*).

Liability for acts of his sub-agents.]—He is liable for his own want of skill (*y*), and for that of those he employs (*z*).[2] The principal generally has no remedy against sub-agent. (*a*).

SECT. 2.—*Measure of damages.*

The general rule.—The liabilities of an agent commence from the [★ 269] moment he consents to act as agent for a lawful ★ con-

(*s*) 4 M. & S. 566.
(*t*) 1 T. R. 112.
(*u*) 3 Bos. & Pul. 489.
(*x*) Callender v. Olerich, 5 Bing. N. C. 58.
(*y*) Harmer v. Cornelius, 5 C. B., N. S. 236.
(*z*) Lord North's Case, Dy. 161; Mackersey v. Ramsays, 9 C. & F. 818.
(*a*) Cobbe v. Becke, 6 Q. B. 930; Robbins v. Fennell, 11 Q. B. 248.

[1] *Ante*, page 3.

[2] A conveyancer employed in the purchase of a ground rent, after receiving opinion of counsel to the effect that it was free of encumbrances, was not liable for negligence when it was discovered that there were encumbrances. Watson v. Muirhead, 57 Pa. St. 161.

An agent is liable for negligence or fraud in appointing a sub-agent, but is not liable for the negligence or fraud of such sub-agent after appointment; as where it is the duty of a bank to whom a note has been given for collection to notify the endorsers thereof in case it is not paid when due, the bank is bound to employ a competent and faithful person to give such notice, otherwise it is liable for his default; but if the note be given to a notary, who is sworn into office, to protest and give notice thereof to the endorsers, the bank is not liable for his default. Smedes v. The Pres. & Directors of Utica Bank, 20 Johns. 372.

Common carriers, however, are liable for all injuries resulting from negligence or misfeasance of themselves, their agents or employés. Hooper v. Wells, Fargo & Co., 27 Cal. 11.

Where one is employed by an agent on his own account, and is under the control of such agent and paid by him, the principal is not responsible for negligence on the part of such employé. Lindsay v. Singer Mfg. Co., 4 Mo. Ap. 570.

sideration. His liability is dependent upon the duties undertaken by him ; but the measure of the damages to which he may be liable must be ascertained by the application of rules common to the whole law of contracts. The general rule of law upon the subject was laid down by the Court of Exchequer in the often-quoted case of *Hadley* v. *Baxendale* (*b*). The rule enunciated by the court in that case is, that where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Here two modes of estimating the damages resulting from a breach of contract are suggested. The measure given by the one is the damage resulting naturally from the breach ; according to the other, it is the damage contemplated by both parties at the time of making the contract. The criterion given by the second part of the rule has never been sanctioned by a direct authority. Wherever it has been appealed to, the judges have shown pretty clearly that it is to be considered as no more than a dictum. *Primâ facie* the damages which actually result from a breach of contract are recoverable, provided that they are such as may fairly and reasonably be considered as arising directly and naturally, that is to say, in the ordinary course of things, from such a breach of contract. Thus, if a client is compelled to pay off an incumbrance owing to his solicitor's negligence in examining the title deeds, the latter will be liable (*c*). The amount of the damages may be unexpectedly large, but still the defendants must pay. If a man contracts to carry a chattel, and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that ★ in [★ 270] the absence of any notice to the defendant of any such circumstances, such damages cannot be recovered (*c*). As to the intimation in the case of *Hadley* v. *Baxendale* (*d*), to the effect that "plaintiff might recover exceptional damages, apart from all questions of a contract with regard to amount of damages, provided there was a special notice of the circumstances," it was suggested in the same case, by Baron Martin and Mr. Justice Blackburn, that,

(*b*) 9 Ex. 341, 354; 23 L. J., Ex. 182.

(*c*) Whiteman *v.* Hawkins, 4 C. P. D. 13; and see Chapman *v.* Chapman, L. R., 9 Eq. 276; British Mutual Ins. Co. *v.* Cobbold, L. R., 16 Eq. 627.

(*c*) Per Blackburn, J., in Horne *v.* Midland Railway Co., L. Rep., 8 C. P. 140.

(*d*) *Supra.*

in order that the notice may have any effect, it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss (*e*).

Summary.]—Upon a review of the authorities, the appropriate rules seem to be the following:—

(1.) The measure of damages recoverable by a principal from his agent in consequence of a breach of duty by the latter is the loss or damage to which the principal has been subjected directly by reason of the agent's default or neglect; in other words, it is the loss or damage of which the agent's breach of duty is the proximate cause.

(2.) The damages may be nominal or substantial—nominal where there is proof of a breach of contract only, but not of resultant damage or loss; substantial where there is proof both of a breach and of resultant loss or damage.

Mr. Justice Story remarks, in his excellent work on Agency, "There must be a real loss or actual damage, and not merely a probable or possible one (*f*). It is a good defence, or rather excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal; for then the rule applies that, though it is a wrong it is without any damage, and to maintain an action both must concur, for *damnum absque injuriâ* and *injuria absque damno* are equally objections to any recovery." If the [★ 271] author meant it to be inferred that a principal ★ has no right of action against his agent unless there is proof of a real loss or actual damage, he is in error, for such a proposition is at a variance with authorities. Thus, in replying to an argument that the action in *Ashby* v. *White* (*g*) was not maintainable because there was no proof of hurt or damage to the plaintiff, Lord Holt observed, "Surely every injury imports a damage, though it does not cost the party one farthing . . . but an injury imports a damage." So it is said by Lord Tenterden, in *Marzetti* v. *Williams* (*h*), that a plaintiff is entitled to have a verdict for nominal damages, although he does not prove any actual damage at the trial (*i*).

Illustrations.]—The measure of the damages to which agents are liable is illustrated by the following cases:—

Nominal damages—Failure to present bill for acceptance.]—The right of the principal to nominal damages is recognized in *Van*

(*e*) The following cases may be referred to upon this question in addition to those cited: Cory v. Thames Ironworks, &c. Co., L. Rep., 3 Q. B. 181; British Columbia Saw Mill Co. *v.* Nettleship, L. Rep., 3 C. P., 499; Tyers v. Rosedale Iron Co., L. Rep., 8 Ex. 305; 10 *ibid.* 195; Gee *v.* Lancashire and Yorkshire Railway Co., 6 H. & N. 211, 30 L. J., Ex. 11; Wilson *v.* Newport Dock Co., L. Rep., 1 Ex. 177; 35 L. J., Ex. 97.

(*f*) Story on Agency, sect. 222.

(*g*) 2 Ld. Raym. 955.

(*h*) 1 B. & Ad. 423.

(*i*) See also Fray v. Voules, 1 E. & E. 839; 28 L. J., Q. B. 232; and VanWart *v.* Woolley, 1 M. & M. 520; Russell on Mercantile Agents, 220; Mayne on Damages, 415.

Wart v. *Woolley* (*k*), in 1830. An agent was employed to present a bill for acceptance; he failed to do so, and Lord Tenterden held that his principal was entitled to nominal damages, although no real damage was occasioned by the neglect, the bill and costs having been by other persons liable on it. "The opinion which I expressed in the former case," said his lordship, referring to the case as reported in 3 B. & C. 439, "that the plaintiff was, at all events, entitled to nominal damages, was not my opinion only, but that of the whole court. I now entertain the same opinion." Injury imports damage, as Lord Holt said, in *Ashby* v. *White* (*l*).[1]

Failure to insure.]—The measure of damages where substantial damages are claimed is the actual and not merely the possible loss or damage sustained by reason of the agent's neglect. Thus, where a mate of a ship, who was to receive certain slaves at the end of the voyage in lieu of wages, instructed his agent to effect an insurance on the slaves, the Court of King's Bench held, in an action against the agent for not insuring, that the plaintiff could not recover more than he could have recovered in an action against the underwriters, which in the case of the slaves was nothing, as they were not the subject of insurance (*m*). ★The same [★ 272] principle was applied in *Fomin* v. *Oswell* (*n*). Lord Tenterden said, in an often-quoted case, that "upon breach of contract a plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference as to the consequences resulting from a breach of contract by reason of that contract being either express or implied. The only difference between an express and implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances and the general course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence" (*o*). As will be at once seen, the question may well be raised whether there is any conflict between those cases which come within the authority of *Webster* v. *De Tastet*,

(*k*) 1 M. & M. 520.
(*l*) *Supra*.
(*m*) Webster *v.* De Tastet, 7 T. Rep. 157.
(*n*) 3 Camp. 357.
(*o*) Marzetti *v.* Williams, 1 B. & Ad. 427.

[1] The agent is liable for damages sustained by the owner of the bill. The measure of damages is *primâ facie* the amount of the bill, but the agent may show circumstances tending to mitigate the damages or reduce the recovery to a nominal amount. Allen *v.* Snydam, 20 Wend. 321; Tyson *v.* State Bank, 6 Blackf. 225; Bank of Washington *v.* Triplett, 1 Peters, 25; Montgomery Co. Bank *v.* Albany City Bank, 3 Selden (N. Y.), 459.

The agent is also liable for any damages resulting to his principal from his neglect in not giving notice to his principal of the non-payment of the note. Smedes *v.* Bank of Utica, 20 Johns, 372.

and those which come within the principle enunciated by Lord Tenterden in *Marzetta* v. *Williams* and *Van Wart* v. *Woolley* (*p*). The solution of the difficulty appears to be that the former class of cases negatives a plaintiff's right to recover substantial damages where there is no proof of loss or damage, whilst the latter affirms his right to nominal damages, though there is merely proof of a breach of contract. Hence the conflict is more apparent than real.

An insurance to commence from the loading of goods at a certain point will not attach on goods previously laden (*q*). Hence, where an insurance broker, employed to insure goods from a certain point on their voyage home, effected a policy "at and from," that point, "beginning the adventure from the loading thereof on board," the Court of Common Pleas held him guilty of gross negligence. The amount of the insurance was 1,000*l.* Of this sum 400*l.* had been paid by two underwriters for 200*l.* each. Another underwriter for 200*l.* had become bankrupt, and Gibbs, C. J., directed this sum, as well as the 400*l.*, to be deducted from the damages. The plaintiff thus obtained a verdict for 400*l.* Nothing appears to have been said about deducting the premium (*r*).[1]

[★ 273] ★ *Unnecessary deviation.*]—In *Davis* v. *Garratt* (*s*), 1830, the defendants had undertaken to carry the plaintiff's lime from the Medway to London. The master of the barge in which it was stored deviated unnecessarily from the usual course. A storm came on during the deviation, and the lime was wetted. Owing to the wetting of the lime the barge caught fire, and the whole cargo was lost. The underwriters refused to pay, alleging the deviation. A verdict having been found for the plaintiff, the defendants applied for a new trial, on the ground that the deviation was not the cause of the loss of the lime sufficiently proximate to

(*p*) 1 Moo. & M. 520.
(*q*) Robertson *v.* French, 4 East, 130; Mellish *v.* Allnutt, 2 M. & S. 106.
(*r*) Park *v.* Hammond, 4 Camp. 344; S. C. 6 Taunt. 495, 815.
(*s*) 6 Bing. 716.

[1] If a factor, whose duty it is to insure, neglects to do so, he becomes the insurer himself and liable to any loss. He is, however, entitled to credit for any premium which should have been paid; Shoenfield *v.* Fleisher, 73 Ill. 404. An agent, who neglects to effect an insurance according to a letter of instruction, is liable as in case of a valued policy, although the instructions contained no precise order to have the policy valued; Miner *v.* Tagert, 3 Binn. (Pa.) 204.

Where the agent volunteers to effect an insurance and neglects to do so, he will not be liable for loss. He, being a mere volunteer, without compensation, cannot be bound by such an undertaking. As where A. and B. were joint owners of a vessel and A. voluntarily undertook to have it insured. Held not liable for not doing so; Thorne *v.* Deas, 4 Johns (N. Y.), 84. He is liable nevertheless for a defective execution of the insurance. The order was to effect insurance from Philadelphia to the Island of St. Domingo, and two ports in the said island. The defendants had an insurance made to one port only, and the vessel and cargo were captured on the voyage from the first port, where she arrived in safety, to the second. The defendants were held liable; French *v.* Reed, 6 Binn. (Pa.) 308.

entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course. A new trial was refused. The court took time to deliver its judgment, which was delivered by Chief Justice Tindal, and is valuable as indicating the connection that must exist between the damage suffered and the agent's act or omission. To the above objection to the right of the plaintiff to recover, his lordship replied, "We think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done."

Where goods destined to a foreign port are captured in consequence of deviation, the owners of the goods are entitled to recover from the owners of the ship only the prime cost of the goods, together with the shipping charges, and not the expense of effecting a policy of insurance upon them, without direct proof that the goods at the time of the loss were enhanced in value beyond their first price to the amount sought to be recovered (*t*).[1]

Negligence in insuring.]—*Mallough* v. *Barber* (*u*), 1815, was an action against insurance brokers for negligence in effecting a policy of insurance. The defendants were instructed by the ★ plain- [★274] tiff to effect "a policy for 550*l.* on the ship *Expedition* and her freight at and from Teneriffe to London." They effected the policy, but did not insert a clause allowing liberty "to touch and stay at all or any of the Canary Islands." Proof was given at the trial that where orders were given to effect such a policy, it was the invariable custom to insert, without instruction, such a clause, inasmuch as ships seldom took in the whole of their cargoes at Teneriffe. Whilst the ship was proceeding to one of those islands, to complete her cargo, she was captured, and the underwriters refused to pay, on the ground of deviation. Lord Ellenborough held that the defendants were liable for not having inserted the clause in the policy, and the plaintiff recovered the sum directed to be insured, deducting the premium.[2]

(*t*) Parker *v.* James, 4 Camp. 112. In Max *v.* Roberts, 12 East, 89, there were material defects in the declaration.

(*u*) 4 Camp. 150.

[1] Story on Agency, §§ 218, 219.

[2] Where factors state their commissions for selling to be 5 per cent. which covers all expenses, insurance, storage, &c., it becomes their duty to insure all goods received by them for sale. In the absence of a custom or usage in the particular business to insure to the full amount, the factor will be liable for the whole value of the property destroyed.

Misrepresentation of authority to sell.]—In *Godwin* v. *Francis* (*x*), decided in 1870, the defendant and four others, being jointly interested in an estate, were desirous of selling the property. An advertisement was issued with the intimation, "To treat and view the property, application to be made to (amongst others) Mr. B. Francis (the defendant)." The plaintiff, after the appearance of the advertisement, wrote to the defendant offering him 10,000*l.* for the estate; the defendant asked 11,000*l.* After some correspondence, during which the plaintiff offered 10,500*l.*, the plaintiff received the following telegram:—"The following telegram has been received . . . from Berry Francis to Charles Godwin:—Your offer for the Liddington estate is accepted; confirm yours by first post." Upon its receipt the plaintiff sent the confirmation. This was on the 23rd October, 1867. The abstract of title was sent to the plaintiff's solicitor on the 29th October. On the 8th November the plaintiff was informed by the solicitors of the supposed vendors that the defendant had acted without authority. The plaintiff sued the vendors, and, continuing the action after they had sworn in answer to interrogatories that the defendant had no authority, assuming that they were bound under the terms of their advertisement, was nonsuited. The plaintiff then brought an action against Francis for misrepresentation of authority, and claimed damages to the amount of 726*l.* 10*s.* 6*d.*, a sum made up of the following items:—Cost of investi- [★ 275] gating title; loss of ★ bargain; costs paid to the former defendant; costs of Francis; plaintiff's own costs in same action; loss on re-sale of stock. At the trial a verdict was taken for the plaintiff, subject to a question whether there was a valid contract under the Statute of Frauds, and to a motion to reduce the damages, the court to draw inferences of fact.

The first question having been decided in the affirmative, the Court of Common Pleas decided that the defendant was liable to pay—1, the cost of investigating the title; 2, the costs incurred and paid by the plaintiff in the action against the vendors down to the time when the answers to the interrogatories had been received and considered by the plaintiff's legal advisers (*y*); 3, the difference between the contract price and the market price of the estate—the sum for which it was sold being *primâ facie* evidence of the latter (*z*). The loss on the re-sale of stock which had been bought

(*x*) L. Rep., 5 C. P. 295.
(*y*) See Spedding *v.* Nevell, L. Rep., 4 C. P. 212.
(*z*) See Engell *v.* Fitch, L. Rep., 4 Q. B. 659.

If he has obtained a partial insurance he is entitled to credit to that extent. Beardsley *v.* Davis, 52 Barb. (N. Y.) 159.

If an agent effects an insurance and subsequently discontinues it, he is liable for loss. Berthond *v.* Gordon, 6 La. 579. Gray *v.* Murray, 3 Johns. Ch. 167. It is the duty of an agent to use good judgment as to the company in which he will insure; if he insures in a company which is reputed as solvent and of good standing, he will not be held liable if the company should subsequently become insolvent. Gettins *v.* Scudder, 71, Ill. 86.

without notice to the defendant, and before the title had been investigated or possession of the land given, was held to be too remote. The defendant's liability on the first point was admitted; his liability upon the second point was put on the ground that in the position in which he was placed by the defendant, it was reasonable for the plaintiff to commence proceedings against the vendors, and that this course continued reasonable until the answers to the interrogatories left no room to doubt what the evidence of the trial would be. By relying on the advertisements after the interrogatories were answered, he acted upon a wrong view of the law, and not upon any mistake as to the authority conferred in fact upon the defendant (*a*). The plaintiff was also entitled to recoup himself for what he lost by the contract not being fulfilled. In the present case, that was the difference between the contract price and market price, though it is quite conceivable that the damages under this head might possibly have been *nil*, *e. g.*, in the event of bankruptcy of the vendors (*b*), since a third party who contracts with an authorized agent can recover from him only what he would be entitled to recover from the vendors, if the defendant had had the authority he warranted, and the vendors refused to perform (*c*).[1]

★ *Simons* v. *Patchett* (*d*), decided in 1857, was an action [★ 276] for a breach of implied warranty that the defendant had authority to purchase a ship for R. & Co. It appeared that R. & Co. had refused to adopt the contract, and that the plaintiff had resold the ship at a loss. A verdict for the plaintiff for the difference between the contract price and that obtained on the resale was upheld. Lord Campbell, C. J., thought the rule which prevailed in the case of sales of real estate was rather anomalous. The principle that the measure of damages is what the plaintiff actually lost by losing the particular contract was upheld in *Ex parte Panmure* (*e*). Reference may also be made to *Firbank's executors* v. *Humphreys* (*f*), *Weeks* v. *Propert* (*g*), and *Collen Wright* (*h*).

(*a*) See *per* Chief Justice Bovill.
(*b*) See *per* Mr. Justice M. Smith, *supra*, and *per* Mr. Justice Blackburn in Richardson *v.* Williamson, L. Rep., 6 Q. B. 279.
(*c*) See *per* Mr. Justice Brett in Godwin *v.* Francis, *supra*.
(*d*) 7 E. & B. 568.
(*e*) 24 Ch. Div. 367. And see Alder *v.* Keighley, 9 Ex. 341; Hughes *v.* Graeme, 33 L. J., Q. B. 335.
(*f*) 56 L. T. 36.
(*g*) L. R., 8 C. P. 427.
(*h*) 7 E. & B. 301; 8 E. & B. 647.

[1] Philpot *v.* Taylor, 75 Ill. 309. Where one entered into a contract for the sale of land not his own, was held liable for the costs incurred by the real owners in defending an action for specific performance brought by the purchaser. If an agent borrows money and invests in property, the principal by appropriating and disposing of the property for his own benefit, ratifies the act of the agent and becomes liable for all money so borrowed. Watson *v.* Bigelow, 47 Mo. 413. See, also, Woodward *v.* Snydam, 11 Ohio, 360; Bray *v.* Gunn, 53 Ga. 144.

Neglect of solicitor to charge judgment debtor in execution.]—In *Russell* v. *Palmer* (*i*), 1767, an action on the case was brought against a solicitor to recover the sum of 3,500*l.* and costs. The plaintiff having employed the defendant to proceed at law against a debtor, obtained a judgment. By a rule of court it was the duty of the defendant to cause the debtor to be charged in execution within a certain period after surrender. The defendant neglected this duty, and the debtor was discharged by *supersedeas*. The plaintiff alleged that he was thereby hindered from obtaining his debt and damages, and had thus suffered a loss to the amount of the sum claimed by reason of the defendant's negligence. At the trial Lord Camden directed the jury to give a verdict for the whole debt. A new trial was afterwards granted on the ground that his lordship had misdirected the jury, for the jury ought to have been left to find what damages they thought fit, inasmuch as the action merely sounded in damages. There was some evidence that the debtor was not totally insolvent, and that the plaintiff probably might be able in time to obtain some part of his debt by execution against his goods. The jury being told they might find what damages they pleased, found a verdict for the plaintiff for 500*l.* The Court of King's Bench subsequently held that the action lay. Mr. Sedgwick (*k*) infers from this case that the jury had in early cases, growing out of the contract of agency, an unlimited control over [★ 277] the amount of compensation which should ★ be awarded as damages. The case, however, is not reported fully enough to justify the conclusion. If such a rule existed, it has long been abolished, and the measure of damage fixed by the law.[1]

Limitation of broker to too small a premium.]—In *Wallace* v. *Telfair* (*l*), 1786, Mr. Justice Buller ruled that where an agent having accepted an order for insurance, limits the insurance broker to too small a premium, in consequence of which no insurance could be procured, the agent is liable to make good the loss to his correspondent.

Unauthorized parting with goods.]—In *The Stearine, &c. Company* v. *Heintzmann*, (*m*), 1864, the defendants were instructed by the plaintiffs not to part with goods to a customer named except for

(*i*) 2 Wils. 325.
(*k*) Damages, p. 400.
(*l*) 2 T., Rep. 188, note.
(*m*) 17 C. B., N. S. 56.

[1] Where a party solicits money to loan, promising to take a first mortgage on real estate and gets the money; but the real estate on which the mortgage was obtained was subject to prior incumbrances, which fact is unknown to the party advancing the money.

The real estate being sold on such incumbrances, the agent is liable for the loss. Shipherd *v.* Field, 70 Ill. 438. Where one was employed to draw up a mortgage and have it recorded, and neglecting to record it immediately and the property becoming otherwise encumbered he was liable for all loss resulting from such neglect. Miller *v.* Wilson, 24 Pa. St. 114.

cash; they violated these instructions, and Sir W. Erle, C. J., left the whole case to the jury; a verdict for the plaintiffs was returned for the value of the goods and expenses incurred by them in respect of a bill of exchange drawn for the price in accordance with the instructions. A rule for a new trial was refused by the full court. "In coming to the conclusion that there was evidence on which the jury might find that the contract was made in substance as alleged," said Chief Justice Earle, in delivering the judgment of the court, "we have in effect decided that there was also evidence on which they might find that the breach was proved. It also follows, in our opinion, that the jury were right in giving the value of the goods, which were lost to the plaintiffs, and the expenses incurred by them in respect of the bill of exchange for the price drawn according to the terms of the letter of the 19th June."[1]

Distinction between sale and agency—Breach of contract—Measure, actual loss.]—In *Cassaboglou* v. *Gibb*, (*n*), which was decided in 1883, the Court of Appeal had under consideration the difference which may exist in the measure of damages where the contract is one of sale from what it is where the contract is one of agency. In the case cited the defendants, who were commission agents abroad, received and accepted an order from the plaintiff, a merchant in London, to purchase and ship for him a quantity of the finest dry new crop Persian opium. The defendants purchased and shipped opium of an inferior description, believing it to be of the kind and quality ordered. The plaintiff paid for the opium before its arrival in London, when he rejected the whole of it. A portion of the opium had been ★ resold to third parties, to whom [★ 278] the plaintiff had to make an allowance on account of its inferiority, and the rest was sold at a lower rate than the plaintiff had paid for it. The plaintiff sought to recover as damages, not the loss he had sustained, but the difference between the value of the opium sold and that actually sent. The Court of Appeal, however, affirming the decision of Manisty and Williams, JJ., held that the defendants were agents and not vendors to the plaintiff, and that, therefore, he was entitled to recover only the amount of the loss he had sustained. Certain remarks of Blackburn, B., in *Ireland* v. *Livingstone* (*o*), to the effect that the commission merchant is a vendor, were qualified by the lords justices.[2]

(*n*) 11 Q. B. Div. 797; 52 L. J., Q. B. 538.
(*o*) L. R., 5 H. of L. at P. 409.

[1] Where the instructions are to sell at a specified price on a given time, the goods must be sold accordingly, otherwise agent liable. Scott *v.* Rogers, 31 N. Y. 676. See, also, Laverty *v.* Snethen, 68 N. Y. 522; Hutchings *v.* Ladd, 16 Mich. 493; Walker *v.* Smith, 4 Dallas (Pa.), 389.

[2] Measure of damages in case of agency. The agent is liable for all losses resulting from the non-performance of his duties, so that the principal will be in as favorable a condition as if the breach had not occurred. Maguire *v.* Dinsmore, 62 N. Y. 35. In case of contract, the measure of damages is the difference between the market value of the goods and the price. Whitmore *v.* Coats,

Summary.]—The principals which may be taken as the result of the cases already quoted with respect to the measure of the damages to which an agent is liable are the following:—

(1.) Nominal damages may be recovered against him upon proof of breach of contract.[1]

(2.) Substantial damages will be recovered against him upon proof that his principal has suffered actual loss by reason of the agent's breach of duty; and the measure of these damages will be the actual loss of which the agent's conduct has been the proximate cause (*p*).[2]

(3.) It follows as a corollary from the second proposition that the agent will not be liable in substantial damages if he proves that implicit obedience to the instructions of his principal could have been attended with no advantageous result.

(4.) It is submitted, however, that the agent under those circumstances would still be liable in nominal damages.

Sect. 3.—*Omission to perform gratuitous Undertaking.*

No obligation to perform gratuitous promise—Exceptions.]—In order to maintain an action against an alleged agent for omitting to perform something undertaken, the principal must show that the agent was bound either by custom, or by some duty imposed on him by law, to do the particular thing. When there has been no consid- [★ 279] eration for his promise, it cannot be said that the ★agent has been bound by contract. This was laid down clearly in the old law books. Thus it was said, if a person promises to build a house within a given time, no action lies for non-performance, unless a consideration be alleged for it (*p*). To the same effect are the observations of Lord Holt in the case of *Coggs* v. *Bernard* (*q*). Such a custom exists in the case of a ferryman, carrier, porter, or inn-

(*p*) See the rule laid down in Hughes *v.* Graeme, 33 L. J., Q. B. 335, and cf. Robinson *v.* Harman, 1 Ex. 850.

(*p*) 1 Rol. Abr. 9, E. 41.

(*q*) Ld. Raym. 909; see, too, Lea *v.* Welch, 2 Ld. Raym. 1516.

14 Mo. 9; McCombs *v.* McKennan, 2 W. & S. 216. If the thing contracted for is not in the market, then on proof of special damage the party is entitled to a larger sum. Blanchard *v.* Ely, 21 Wend. 342. See Clement *v.* Messerole, 107 Mass. 362.

[1] Frothingham *v.* Everton, 12 N. H. 239.

[2] Taylor *v.* Knox, 1 Dana (Ken.), 395; Shipherd *v.* Field, 70 Ill. 438; Beardsley *v.* Dairs, 52 Barb. (N. Y.) 159; Schmerlz *v.* Dwyer, 53 Pa. St. 335; Fuller *v.* Ellis, 39 Vt. 345; Whitney *v.* Merchant's Express Co., 104 Mass. 152; Hutchings *v.* Ladd, 16 Mich. 493; Thompson *v.* Gwynn, 46 Miss. 522; Tuite *v.* Wakelee, 19 Cal. 692; Kemper *v.* Roblyer, 29 Iowa, 274; Bessent *v.* Harris, 63 N. C. 542; Howell *v.* Morlan, 78 Ill. 162; Marr *v.* Barretts, 41 Me. 403; Poindexter *v.* King, 21 La. An. 697; Tyson *v.* State Bank, 6 Blackf. 225; Bidwell *v.* Madison, 10 Minn. 13; Roberts *v.* Thompson, 14 Ohio St. 1; Webster *v.* Whitworth, 49 Ala. 201; Turner *v.* Turner, 36 Tex. 41.

keeper (*r*), but not in the case of an attorney (*s*). There are but few reported cases in which any question of the liability of an unremunerated agent for *nonfeasance* has been raised. The most recent appears to be that of *Balfe* v. *West* (*t*). The law was settled at an early period, and has so remained.

Builder's contract.]—In *Elsee* v. *Gatward* (*u*), 1793, it was alleged in the declaration that the plaintiffs being about to build a warehouse, and to rebuild certain parts of a dwelling-house, were desirous of having the necessary work completely finished by a certain day mentioned. It was further alleged that the plaintiffs, at the special instance and request of the defendant, a builder, who had full notice of the premises, retained and employed the defendant to do and perform all the bricklayers' and carpenters' work which should be requisite, and within the time mentioned. The alleged breach was that the defendant neither did nor would finish the work as agreed. In consequence of the defendant's neglect it was alleged that the walls of the premises in question were greatly sapped and rotted, and the ceilings damaged and spoiled. The defendant demurred, and the demurrer was allowed. A second count, which stated that the plaintiff being possessed of some old materials, retained the defendant to perform the carpenters' work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, and thereby increased the expense, was held to be good. The judgments in this case contain full exposition of the law upon the subject.

Lord Kenyon said: "If this had been an action of *assumpsit* it could not have been supported for want of a consideration; it would have been *nudum pactum*. . . . . I do not think that the ★ first count in the declaration is good in law. It [★ 280] states that the defendant, who is a carpenter, was retained by the plaintiffs to build and repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking is he bound to perform all the work that is tendered to him; and therefore the amount of this is that the defendant has merely told a falsehood, and has not performed his promise; but for his non-performance of it no action can be supported. . . . Upon the authority of *Coggs* v. *Bernard*, and the cases there noticed, not contradicted by any other decision, I think that the first count for *nonfeasance* is bad, but that the second count may be supported. . . . This comes within the case mentioned by Lord Holt in *Coggs* v. *Bernard;* speaking of the same case in the Year Books (*x*), he said: 'But there the question is put to the court, What if he had built the house unskilfully? and it was

(*r*) See Elsee *v.* Gatward, 5 T. R. 143.
(*s*) Fish *v.* Kelly, 17 C. B., N. S. 194.
(*t*) *Infra.* (*u*) 5 T. R. 143. (*x*) 11 Hen. 4, 33.

argued in that case an action would have lain,' for the defendant could not have been compelled to build this house, and to use the old materials, yet having entered upon the contract he was bound to perform it; and not having performed it in the manner proposed, an action lies against him."[1]

Mr. Justice Ashurst said: "In this case the defendant's undertaking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation to compel him to perform this work, and that distinguishes this case from those of a common carrier, porter, and ferryman, who are bound from their situations in life to perform the work tendered to them. . . . . It is, indeed, alleged that he (the defendant) did not finish the work, from whence the plaintiffs wish the court to infer that he had begun it; but as that is the gist of the action it should have been stated expressly. . . . But it has been contended that it was not necessary to allege that the defendant was employed to perform this work for hire and reward, it being stated that he was retained. . . . The word 'retain' does not necessarily show that there was a consideration."

Steward of race.]—In *Balfe* v. *West* (*y*), 1853, the defendant, who had, without remuneration, accepted the office of steward [★ 281] ★of a horse-race, was held not to be responsible for a loss suffered by the plaintiff, who entered a horse for the race, and alleged that the loss was due to the steward's nonfeasance in omitting to appoint a judge to determine the winner, there being no allegation that the steward had entered upon the duties of his office.

Actionable negligence.]—It may be taken as a universal proposition that an agent, whether remunerated or unremunerated, is liable to his principal for the loss suffered by the latter owing to the negligence of the agent in performing the duties undertaken. The distinction between paid and unpaid agents vanishes in considering their liability for misfeasance. No universal rule, however, can be laid down to determine what amount of negligence will render each and every agent liable. Actionable negligence is not a constant but a variable quantity. Actionable negligence varies with the amount of skill any particular agent or class of agents is presumed to bring to bear upon the performance of the duties he has undertaken.

Gross negligence, an uncertain term.]—If the expression "gross negligence" is intended as a definition, it wholly fails of its object, But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term, it has been said, may be of use if retained as a short and convenient mode of describing the degree of responsibility which at-

(*y*) 13 C. B. 466.

[1] Thorne *v.* Deas, 4 Johns. (N. Y.) 84. Compare French *v.* Reed, 6 Binney, (Pa.) 308.

taches upon a gratuitous bailee (*z*). Baron Rolfe's remark with reference to the expression "gross negligence" has been accepted expressly by several judges. Mr. Justice Willes (*a*) said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." The remark of Baron Rolfe (*b*) is to the effect that negligence and gross negligence are the same thing, the latter merely having a vituperative epithet added. The expression, however, has no fixed and certain meaning as an accurate test of liability, and it would be well if it were abolished. The confusion which has been introduced into English law by questions with reference to gross negligence is ★ not hard to ac- [★ 282] count for. Lawyers who recognized and adopted the phrase, observing that actionable negligence was of various degrees, were content to accept the expression as being sufficiently descriptive of one form of actionable negligence. Upon this ground it was that Lord Chelmsford wished to retain the expression (*c*). The use of the expression has, however, tended to introduce confusion, and that of necessity. The gratuitous bailee, like any other agent, is liable for breaches of duty; but his duties differ from those of other bailees, hence there are varying degrees of actionable negligence. The duties of any agent or class of agents are either known or easily discovered; but it is hard to say what meaning the word "gross" has as applied to negligence. The confusion would be entirely got rid of if we said that every agent is liable for a breach of duty, and considered the liability of the agent by reference to his duties and the amount of care, diligence, and skill required of him by law. The same result would also be obtained if the main division of negligence adopted was that which distinguished negligence into actionable negligence and non-actionable negligence. If this plan was adopted, the simple question to be considered in any question as to the liability of a defendant would be not whether the negligence was gross or otherwise, but whether the facts showed that there had been a breach of duty. Practically, of course, that is the question raised in every action for negligence.

SECT. 4.—*Negligence in Performing Undertaking.*

Illustrations of misfeasance.]—An agent is liable for misfeasance in performing a gratuitous undertaking if he fails to exercise that degree of skill which is imputable to his situation or employment. Any failure on his part to fulfil the obligations imposed upon him as being possessed of the skill which he holds himself out to the world as possessing is actionable negligence.

(*z*) See per Lord Chelmsford in Giblin *v.* M'Mullen, L. Rep., 2 P. C. 336.
(*a*) Grill *v.* General Iron Screw Colliery Co., L, Rep., 1 C. P. 612.
(*b*) Wilson *v.* Brett, 11 M. & W. 113.
(*c*) See Giblin *v.* M'Mullen, L. Rep., 2 P. C. 336.

The following cases sufficiently illustrate the above propositions:—

General merchants.]—In *Shiells* v. *Blackburne* (*d*), decided 1789, the defendant, a general merchant, undertook without [★ 283] ★ reward to enter a parcel of goods of G. together with a parcel of his own of the same sort at the custom house for exportation. In order to save the expense and trouble of a separate entry at the custom house, he by agreement with G. made one entry of both the cases, but did it under the denomination of wrought leather instead of dressed leather. Owing to this mistake the two cases were seized, and the assignees of G., who had become bankrupt, brought an action to recover the value of G.'s parcel. The defendant's liability was urged on the ground that although an action would not lie for nonfeasance, it would for a misfeasance.

Lord Loughborough agreed with Sir William Jones (*e*) that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. His lordship acknowledged, too, that if in this case a ship broker or a clerk in the custom house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application under the circumstances of this case is made to a general merchant to make an entry at the custom house, such a mistake as this is not to be imputed to him as gross negligence.

Mr. Justice Heath said, "The defendant in this case was not guilty either of gross negligence or fraud, he acted *bonâ fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable.

Undertaking to procure insurance.]—*Wilkinson* v. *Coverdale* (*f*), 1793, was an action against a person who had gratui- [★ 284] tously ★ undertaken to procure an insurance against fire for certain premises belonging to the plaintiffs, but who, in affecting it, acted so negligently that the plaintiff lost the benefit of it, and suffered a total loss. Lord Kenyon, before whom the case was tried expressed a doubt whether any action could be maintained

(*d*) 1 H. Bl. 158.
(*e*) Law of Bailments, p. 120.
(*f*) 1 Esp. 74.

on such an undertaking. Erskine for the plaintiff thereupon cited a manuscript note of the case of *Wallace* v. *Telfair*, decided at nisi prius before Mr. Justice Buller, when it was ruled in a similar action, "that though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect, by getting a policy underwritten, but did it so negligently that the party could derive no benefit from it, in that case he should be liable to an action." [1] Lord Kenyon acquiesced, but the plaintiff failing to prove any promise to insure on the part of the defendant, was nonsuited. If, however, there had been any duty incumbent upon the defendant to insure, and he had failed to do so, he would be liable. Thus, in *Smith* v. *Lascelles* (*g*), 1788, Ashurst, J., says, "One person cannot compel another to make an insurance for him against his consent; but if the directions to insure be given to him, to whom the application would naturally be made in the usual course of trade, and he do not give notice of his dissent, he must be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance."

In *Coplett* v. *Gordon* (*h*), decided in 1813, the plaintiff residing in South America, sent a bill of lading of certain bales of cotton to the defendants, who were merchants in London, and requested them to effect insurance to the full amount. The defendants had not done business for the plaintiff before, and had given no promise to act as his consignees, nor did they wish to do so. On receiving the bill of lading they indorsed it over to M., a friend and creditor of the plaintiff. M. procured the insurance, and received the goods, but afterwards became insolvent, with the proceeds in his possession. The plaintiff then sued the defendants for the value. The case was tried before Lord Ellenborough, who told the jury that the defendants had no right to indorse the bill of lading, though he was not quite clear what they ★ ought to have [★ 285] done. "They had their election," said his lordship, "either to take or reject the bill of lading. If they took it, they were bound to take it according to the terms of the consignment, by which they themselves were to insure and sell the goods." A verdict for the value of the goods was entered for the plaintiff.

Architects.]—An action lies by a builder against an architect who fraudulently, and in collusion with the builder's employer, refused to certify, the architect having an interest in the building contract (*i*). But an action will not lie against him for want of skill in ascertaining the amounts to be paid by a builder under a contract, his error being an error of judgment (*k*).

(*g*) 2 T. R. 187.
(*h*) 3 Campb. 471.
(*i*) Ludbrook *v.* Barrett, 46 L. J., C. P. 798; 36 L. T. 616.
(*k*) Stevenson *v.* Watson, 4 C. P. D. 148; 48 L. J., C. P. 318.

[1] French *v.* Reed, 6 Binney (Pa.), 308.

Broker appointed to act as arbitrator not liable for want of skill.] —In *Pappa* v. *Rose* (*l*), the defendant was a broker employed by the plaintiff to sell some raisins on the terms of the following sale note: "Sold by order, and on account of P. (the plaintiff), to arrive, to my principals H. and Son, 500 tons of black Smyrna raisins, 1859 growth, fair average quality, in the opinion of the selling broker;" signed J. R. (the defendant). Upon the arrival of the raisins, H. and Son objected to their quality: the defendant accordingly examined them, and decided that they were not of the quality mentioned in the sale note. The buyers accordingly refused to accept them. The plaintiff then brought an action against the broker on the ground that he had shown want of skill in deciding upon the quality of the currants. The Chief Justice of the Common Pleas (Sir W. Bovill), after consulting Mr. Justice Willes, ruled, so far as the ruling is material to the present question, that the defendant was appointed to act as an arbitrator or judge of the quality, and was, therefore not liable for an error in judgment or want of skill in certifying the quality if he acted honestly and *bonâ fide*. The plaintiff elected to be nonsuited. A rule for a new trial was discharged by the Common Pleas, the judgment of which court was affirmed in the Exchequer Chamber. Mr. Justice Brett said, "I think it is quite unnecessary for us to determine what is the true construction [★ 286] ★ of the contract, because I think the Lord Chief Justice was clearly right on the second point. The ruling upon that was not that the defendant was in the strict sense of the term an arbitrator, but that he was a person filling a position which brought him within an exception well known to the law of England, viz., that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge. The question is merely one of implied undertaking; and the law says there is none such. Was, then, the defendant within that exception? I apprehend that every person falls within it who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion."

In the Exchequer Chamber, Chief Baron Kelley said: "It is the duty of the broker to make the contract, and he must enable his principal to enforce it, which he cannot do unless he (the broker) expresses his opinion on the goods. But having entered into an implied contract to give that opinion, is he bound to exercise skill in the matter? He may have impliedly contracted to do all that is necessary to enable him to give an opinion, that is to say, he is bound to examine the goods, as no one can give an opinion on goods without looking at them. . . . The position of an arbitrator was used in the court below only as an illustration, and to assist the

(*l*) L. Rep., 7 C. P. 32; affirmed *ibid.* 525, 1872. And see Tharsis Sulphur &c. Co. *v.* Loftus, L. R., 8 C. P. 1.

court in determining the nature of the contract. If two parties agree to submit a question to a third, the third party is not bound to give an opinion. But if this third party is in any way a party to the transaction, and is acting for hire and reward, he is just as much bound to give his opinion as the other two are to abide by it. . . . If the arbitrator agrees to give an opinion, I deny that there is any contract to use skill."

Valuers.]—*Jenkins* v. *Bethan* (*l*) was distinguished on the ground that the defendant, who was employed as a valuer, was a valuer, and thereby held himself out as a person possessing skill in the subject-matter. A valuer is not an arbitrator (*m*).

Patent agents.]—A patent agent is bound to know the law ★ with regard to the practice of obtaining patents, and [★ 287] should watch the decisions of the courts with care. If he fails to do so and damage results, he will be liable for his negligence (*n*).

Summary.]—The result of the cases may be stated in the following terms:—

(1.) An agent, whether remunerated or unremunerated, may be liable for negligence in performing an undertaking.[1]

(2.) Actionable negligence in the case of an unremunerated agent consists in a failure to exercise that skill which is imputable to his situation or employment, or which he holds himself out to the world as possessing.

Telegraph companies do not guarantee accuracy to receiver.]—Telegraph companies are at most mere forwarders of messages, and are not bound to understand the object of the sender, nor do they profess to carry on the business of agents to make contracts any more than does the Post Office. Hence, such companies do not guarantee to mere receivers the accuracy of telegrams passing over the wires (*o*).[2]

SECT. 5.—*Profits made in course of Agency.*

Profits made in agency belong to principal.]—All profits directly or indirectly made in the course of, or in connection with, his employment by a servant or agent without the sanction of the master or principal, belong absolutely to the master or principal (*p*). So, whenever the earnings acquired in the service of a third person

(*l*) 15 C. B. 160; 24 L. J., C. P. 94.
(*m*) Leeds *v.* Burrows, 12 East, 1.
(*n*) Lee *v.* Walker, L. R., 7 C. P. 84; 41 L. J., C. P. 91.
(*o*) Dickson *v.* Reuter's Telegraph Co., 2 C. P. Div. 62; 46 L. J., C. P. 197; 35 L. T. Rep., N. S. 842.
(*p*) Massey *v.* Davis, 2 Ves. jun. 317; Williamson *v.* Barbour, 9 Ch. D. 529; 50 L. J., Ch. 147; 37 L. T. 698.

[1] Howell *v.* Morlan, 78 Ill. 162; French *v.* Reed, 6 Binney, 308.
[2] In this country the rule is the contrary, see *ante*, p. 169, note 1.

have reached the hands either of the servant who acquired them or of the master, they belong to the master. These principles apply to all cases of employment as servants or agents, the profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belonging to the master or principal (*q*). There is a legal duty incumbent on the agent to pay over such profits to his principal (*q*).[1] As to the rule that no person in the [★ 288] position of a treasurer shall make ★ a profit out of his trust, reference may be made to *Broughton* v. *Broughton* (*r*).

Earnings of apprentice.]—The above principles are illustrated by a variety of cases, of which it will suffice to select the following. Some of the earlier cases refer to apprentice and master. In *Barber* v. *Dennis* (*s*), decided in 1703, the widow of a waterman, by the usage of Watermen's Hall, had taken an apprentice. This apprentice was impressed, taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the hands of the defendant, and it was held that the widow was entitled to maintain trover against the defendant, on the ground that the possession of the apprentice was that of the master, and that whatever he earns shall go to the master. So it was said in a subsequent anonymous case (*t*), that trover lies by the master for the ticket or other writing entitling his apprentice to money earned by him during his apprenticeship, although upon the particular facts of the case the action was held not to be maintainable.

Interest of principal's money.]—In a case decided in 1799 (*u*), Lord Kenyon ruled at Nisi Prius that interest made by an agent by the use of his principal's money belonged to the principal, and might be recovered by him in an action for money had and received. His lordship also ruled that where money is remitted to an agent, and he suffers it to remain dead in his hands, he is not liable to pay interest;[2] but that if he mixes it with his own, or makes use of it, he is liable to pay interest (*x*).[3]

Services performed, and premiums claimed by master of ship—Custom.]—This subject is illustrated by *Thomson* v. *Havelock* (*y*), decided in 1808. The plaintiff, the captain of a ship, brought an action to recover from the shipowner money paid to the latter by a

(*q*) Per Cockburn, C. J., in Morison *v.* Thompson, L. Rep., 9 Q. B. 483.
(*r*) Per Lord Cranworth, 5 De G., M. & G. 164; Clark *v.* Carlon, 4 L. T. 361; and *Re* Corsellis, 33 Ch. Div. 160.
(*s*) 6 Mod. 69.
(*t*) 12 Mod. 415.
(*u*) Rogers *v.* Boehm, 2 Esq. 702.
(*x*) See Travers *v.* Townsend, 1 Bro. C. C. 384; Franklin *v.* Frith, 3 Bro. 433.
(*y*) 1 Camp. 527.

[1] Parker *v.* Nickerson, 112 Mass. 195; Greentree *v.* Rosenstock, 61 N. Y. 583; Lafferty *v.* Jelley, 22 Ind. 471; Church *v.* Sterling, 16 Conn. 388; Hitchcock *v.* Watson, 18 Ill. 289; Hansacker *v.* Sturges, 29 Cal. 142.
[2] See Clark *v.* Moody, 17 Mass. 145.
[3] Webster *v.* Pierce, 35 Ill. 178; Hill *v.* Hunt, 9 Gray (Mass.), 66.

third party for services performed by the captain in the course of his employment; and it was held that, as between him and his employers, the money belonged to the shipowner. "It is contended," Lord Ellenborough directed the jury, "that a servant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his services, or a part of ★them, to another. [★ 289] . . . No man should be allowed to have an interest against his duty." The same learned judge ruled to the same effect in *Diplock* v. *Blackburn* (*z*), decided in 1811. There the master of a ship in a foreign port claimed to retain for his own benefit the premium received by him upon a bill drawn on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use. Lord Ellenborough ruled that the money belonged to the owner, and not to the captain. "If a contrary usage has prevailed," said his lordship, "it has been a usage of fraud and plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty." The cases in equity are to the same effect.[1]

Discounts allowed to army agents and contractors.]—No case has gone further than that of *Turnbull* v. *Garden* (*a*), decided in 1859. There an army agent and contractor was employed by the plaintiff to provide for her son a reasonable outfit for India. The articles composing such outfit were accordingly paid for through the agent, who debited the plaintiff in account with the full amount of the invoice prices charged by the tradesmen supplying the outfit, though discount had been allowed him in each instance. This was done by him on the ground, as alleged, that it was the universal practice as between tradesmen and army agents. The plaintiff had no actual knowledge of such practice. An action was commenced by the defendant in the Mayor's Court against the plaintiff to recover the balance of his account, and certain moneys deposited by her with her bankers were attached to answer the claim. The plaintiff thereupon filed a bill praying a general account, and an injunction to restrain the further prosecution of the action. The court directed the account to be rectified by disallowing as against the plaintiff the full amount of the discounts retained by the defendant. "What appears in this case," said Vice-Chancellor James, "shows the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting."

★ *Profits made by agent for purchaser who sells his own* [★ 290]

(*z*) 3 Camp. 43.
(*a*) 38 L. J., Ch. 331.

[1] Parker *v.* Nickerson, 112 Mass. 195; Bain *v.* Brown, 56 N. Y. 285.

property.]—The next case is that of *Kimber* v. *Barber* (*b*). There the plaintiff being desirous of procuring shares in a company, the defendant had represented to him that he could procure some at 3*l.* per share; plaintiff agreed to purchase at that price, and certain shares were thereupon transferred, part to the plaintiff and part to his nominee, and were paid for at 3*l.* per share. The plaintiff afterwards discovered that the defendant was himself the owner of the shares, having lately purchased them for 2*l.* per share. On appeal it was held (reversing the decision of the Master of the Rolls), that the defendant was an agent for the plaintiff, and he was ordered to pay back the difference in the price of the shares.[1]

Commission received by broker.]—The whole subject was ably discussed in 1874, and the authorities examined in a judgment of the Queen's Bench, delivered by Lord Chief Justice Cockburn in the case of *Morison* v. *Thompson* (*c*). This was an action by the purchaser of a steamship to recover from the broker, employed to purchase the ship as cheaply as possible, the sum of 225*l.* received by him from the broker of the vendor by way of commission. At the trial a verdict was entered for the plaintiff, with leave to enter a verdict for the defendant, if the court should be of opinion that money had and received could not be maintained on the facts. A rule obtained accordingly was discharged "In our judgment," said his lordship, "the result of these authorities is that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer."[2]

Acquiescence of principal.]—Acquiescence on the part of the principal affords the agent a good defence. In *Great Western Insurance Company* v. *Cunliffe* (*d*), decided in the year 1874, a marine insurance company in New York appointed a firm of merchants in [★ 291] London their agents for settling claims in England ★ and for effecting re-insurances. For settling the claims the agents were to receive a fixed percentage, but nothing was provided as to remuneration for re-insuring. According to custom as between underwriters and brokers, the agents were allowed by the underwriters 5 per cent. on each re-insurance, and also, at the end of the year, on

(*b*) L. Rep., 8 Ch. 56.
(*c*) L. Rep., 9 Q. B. 480.
(*d*) L. Rep., 9 Ch. 525.

[1] Tewksbury *v.* Spruance, 75 Ill. 187; Taussig *v.* Hart, 58 N. Y. 425. See Keigler *v.* Savage Mfg. Co., 12 Md. 383.

[2] Holcomb *v.* Weaver, 136 Mass. 265; Bollman *v.* Lewis, 41 Conn. 581; Atlee *v.* Finck, 75 Mo. 100; Byrd *v.* Hughes, 84 Ill. 174.

the general balance between the underwriters and the broker, 12 per cent. on the profits of the year if there were profits. The firm in London were in the habit of receiving both these percentages, but only the 5 per cent. was mentioned in their accounts sent to the insurance company. The company discovered this in 1866, but made no objection to it until 1868. In 1869 the company filed a bill against the firm in London, for an account in which the 12 per cent. should be accounted for and it was held that the firm in London were entitled to retain the 12 per cent. received and the interest charged by them as remuneration.

The principle of *Great Western Insurance Company* v. *Cunliffe* was applied in 1877 to the case of *Baring* v. *Stanton* (*e*), and the custom was held binding upon a foreigner. The Court of Appeal again affirmed the rule, that if a person employs another to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons, and does not choose to inquire what the amount is, he must allow the ordinary amount which agents are in the habit of charging. There a shipowner, who for ten years had employed a firm to effect insurances on his ships, and from time to time had settled accounts without inquiring as to the custom, was held not to be entitled to call upon the firm for an account of deductions made to the firm, viz., 5 per cent. brokerage, and 10 per cent. discount for cash, payments which had been allowed by the underwriters on each transaction.

The profits must be made in the agency.]—To entitle the principal to recover it would seem to be essential that the profits should be made by the agent in his employment as agent. For instance, if a person employed to sell a stack of hay finds a purchaser who commissions the same agent to find him a buyer for a plot of ground, for which service he is to receive 100*l.*, the first principal, assuming that he bought the land in question, ★having re- [★ 292] ceived offers from the agent, would not be entitled to claim this sum as profits made in the course of the agency. Again, if an agent employed to buy a horse is promised by third parties a bonus if he succeeds in inducing his employer to buy a certain machine or the like, the latter probably could not claim the bonus as profits made in the course of the agency, unless the agent had undertaken to give all his time to his employer.

Agreement that agent shall keep proceeds of sale in excess of price named.]—The principal will not be entitled to claim the profits mode by the agent when, having commissioned the latter to sell for a price named, he agrees that the agent shall retain all money received over that amount. By the application of this principle the Court of Appeal reversed the decision of Vice-Chancellor Mal-

(*e*) L. R., 3 Ch. Div. 502; 35 L. T. Rep., N. S. 652.

ins in *Morgan* v. *Elford* (*d*). From the circumstances of the case the court held that no fiduciary relation existed between the plaintiff and the defendant. The defendant was employed by the plaintiff to sell a colliery on the terms that whatever he received in addition to 25,000*l.* should be his remuneration. He sold to C. and others for 30,000*l.*, but those named as purchasers other than C. were really sub-purchasers for 40,000*l.* The question for decision was whether the principal, under the circumstances, was entitled to call upon the defendant and C. to refund the 10,000*l.* received by them in addition to the 5,000*l.* as profits made in the course of the defendant's agency.

SECT. 6.—*Liability of Agent to account.*

Duty of agent to account.]—It is the first duty of an agent, as Sir Thomas Plumer said, in *Pearse* v. *Green* (*e*), quoting the words of the Lord Chancellor in *Lord Hardwicke* v. *Vernon* (*f*), to be constantly ready with his accounts. This must mean that the agent must be ready to render his accounts when they are demanded.[1] If no demand is made, and there has been no fraudulent dealing with [★ 293] the money on the part of the agent, but ★ merely non-delivery of accounts, the agent is not liable for interest (*g*).

What agent.]—Wherever a fiduciary relation exists between a principal and his agent, the former is entitled to an account against the agent as against the trustee (*h*).

Statute of Limitations.]—Wherever a fiduciary relation exists between a principal and his agent, the Statute of Limitations does not apply in favour of the latter (*i*). Hence, in an action for an account by the principal, the agent cannot set up the statute as a bar (*k*). The position of an agent differs from that of a banker in this respect (*l*).[2]

Right to interest.]—An agent may be bound to account—

(*d*) L. R., 4 Ch. Div. 352.

(*e*) 1 Jac. & W. 120, followed in 1887 in Harsant *v.* Blaine & Co., 56 L. J., Q. B. 511.

(*f*) 14 Ves. 504. So the executors of an undersheriff must pay money received for the creditor: Gloucestershire Banking Co. *v.* Edwards, 56 L. J., Q. B. 514.

(*g*) See per Lord Chelmsford, C., Turner *v.* Burkinshaw, L. R., 2 Ch. Ap. 488.

(*h*) Att.-Gen. *v.* Edmunds, L. R., 6 Eq. 381; Moxon *v.* Bright, *ib.*, 4 Ch. 292; Makepeace *v.* Rogers, 34 L. J., Ch. 396; James *v.* Holmes, 31 *ib.*, 567.

(*i*) Sheldon *v.* Weldman, 1 Ca. C. 26; Heath *v.* Henley, *ib.*, 20; Teed *v.* Beere, 5 Jur. N. S. 381.

(*k*) Burdick *v.* Garrick, L. R., 5 Ch. Ap. 233; *Re* Bell, 55 L. T. 757.

(*l*) Foley *v.* Hill, 2 H. L. C. 35.

[1] Greentree *v.* Rosenstock, 61 N. Y. 583.

[2] Firestone *v.* Firestone, 49 Ala. 128; Wolford *v.* Herrington, 74 Pa. St. 311; Rings v. Binns, 10 Peters, 269.

(1.) For the property of his principal.
(2.) For interest in some cases.

Executors in all cases must account for interest if they have used the money in trade, or received any interest for it (*m*).

If in any case an executor or trustee makes any advantage of the trust money, the *cestui que trust* is entitled to it; and if he incurs any loss by undue management or wilful neglect, he must answer for it to the *cestui que trust* (*n*).[1]

So a receiver of a public trust who made interest of the balances in his hands (*o*); an administrator who retained and made use of the undistributed property (*p*); mercantile agents who made use of remittances as their own (*q*); a person bound by recognizances to account annually, though he had made no use of the money (*r*); and a receiver keeping money in his hands after it was due (*s*), have been held accountable for interest. An auctioneer being, as a rule, only a stakeholder, is not liable to pay interest on money in his hands, whether he has used the money or not (*t*).

Probably few branches of English law have presented greater ★ difficulties in the attempt to reduce the decisions to [★ 294] consistent principals than that which relates to the principal's right to interest on account of money in the hand of his agent. Lord Ellenborough, in a case decided in 1807 (*u*), stated the rules to which he intended to adhere. "I want very much," said his lordship, "to lay down a certain rule respecting the payment of interest. I recollect some extremely conspicuous determinations on this subject; and on all occasions as little as possible should be left in the discretion of a judge. It appears to me that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used and interest has been actually made." An agent, who by the authority of his principal keeps large sums of money in his hands for which he was to be responsible, and for which he duly accounted, is not liable to pay interest even supposing he employs such money (*x*).

(*m*) Ratcliff *v.* Graves, 1 Vern. 196.
(*n*) Lawson *v.* Copeland, 2 Bro. C. C. 156; Hill *v.* Simpson, 7 Ves. 152; Lee *v.* Lee, 2 Vern. 548.
(*o*) Earl of Lonsdale *v.* Church, 3 Bro. C. C. 41.
(*p*) Stacpoole *v.* Stacpoole, 4 Dow. 209. (*q*) Rogers *v.* Boehm, 2 Esp. 702.
(*r*) Dawson *v.* Massey, 1 Ball & B. 219.
(*s*) Fletcher *v.* Dodd, 1 Ves. jun. 85.
(*t*) Harington *v.* Hoggart, 1 B. & Ad. 577.
(*u*) DeHavilland *v.* Bowerbank, Camp. 49.
(*x*) Lord Salisbury *v.* Wilkinson, cited by Lord Eldon in Lord Chedworth *v.* Edwards, 8 Ves. 47.

[1] Norris' Appeal, 71 Pa. St. 106; Robinetts' Appeal, 12 Casey (Pa.), 174.

Agent for sale—Full disclosure.]—An agent for sale cannot retain an interest in the purchase without a full disclosure to his principal. *Dunne* v. *English* (*y*), *Murphy* v. *O'Shea* (*z*), and *Lowther* v. *Lowther* (*a*), support the proposition.

By full disclosure is meant, not that the principal was sufficiently informed to be put upon inquiry, but that he has had the fullest information given to him, and is not put to the necessity of making any inquiry (*b*).[1]

A mere agent is to account to his principal only (*c*). An agent for sale, and whether in a fiduciary position or not, may have authority to appoint a sub-agent, and yet have no authority to make a contract of agency between the two. Privity does not necessarily exist betwen a principal and a sub-agent, so as to entitle the latter to claim his commission from the principal, or the principal to call for an account after sale.

The New Zealand, &c. Co. v. *Watson* (*d*), which was determined [★ 295] ★ by the Court of Appeal in 1881, was an action to recover a balance of 2,571*l.* 8*s.* 6*d.* in the defendant's hands, of the proceeds of three cargoes of wheat consigned to them for sale by M. and T., merchants and factors at Glasgow. The plaintiff company employed M. and T. to sell this wheat upon terms, one of which was that they should have 3 per cent. commission, and that it should be a *del credere* agency. M. and T. employed the defendants to sell upon different terms, and for payment of 2 per cent. commission. The plaintiffs knew that M. and T. sold through brokers, but knew nothing of the defendants. Upon the sale, the defendants paid the proceeds into their own bankers, and made remittances to M. and T. The proceeds could be traced and identified. M. and T. failed, being indebted to the defendants upon another account. The latter claimed the proceeds on the ground that they had accounted to M. and T. The jury found that the plaintiffs did not employ the defendants to sell and account for the proceeds to the plaintiffs, and that the defendants did not accept that employment and sell for the plaintiffs, but that the defendants knew, or had reason to believe, that M. and T. were acting in their sales as agents. Field, J., on these findings, gave judgment for the plaintiffs upon the grounds—(1.) That the defendants were sub-agents of M. and T. (2.) That it was a case of principal and agent, and a principal can intervene in a contract which his broker and

(*y*) L. R., 18 Eq. 524.
(*z*) 2 J. & Lat. 422.
(*a*) 13 Ves. 95.
(*b*) Fawcett *v.* Whitehouse, 1 Russ. & My. 132, and per Jessel, M. R., Dunne *v.* English, L. R., 18 Eq. 535.
(*c*) Myler *v.* Fitzpatrick, 6. Madd. 360.
(*d*) 7 Q. B. Div. 374.

[1] Love *v.* Hoss, 62 Ind. 255; Meyer *v.* Hanchett, 43 Wis. 246; Cook *v.* Berlin Woolen Mills Co., 43 Wis. 433; Peckham Iron Co. *v.* Harper, 41 Ohio St. 100. Everhardt *v.* Searle, 57 Pa. St. 247.

agent has made. Bramwell, L. J., agreed with these grounds, but differed from the conclusion that they entitled the plaintiffs to recover; for although a principal may have authority to employ a sub-agent, he does not necessarily have authority to make a contract of agency between the sub-agent and the principal. (3.) That defendants knew, or had reason to believe, that M. and T. were acting as agents. Bramwell, L. J., thought no privity existed between the plaintiffs and the defendants, and that no fiduciary relation existed between them, although, as Baggallay, L. J., remarked, that relation might exist between M. and T. and the plaintiffs. The appeal was allowed. It was contended, too, that the plaintiffs were entitled at common law to follow the goods or proceeds; and Bramwell, L. J., admitted that, before sale, the plaintiffs might have called for the bills of lading, but after sale they could not call for more than the defendants were liable to account for after adjusting their accounts with M. and T. As to whether the defendants could have retained the bills for advances, his lordship expressed no opinion.

★ *Agent liable to principal only.*]—It is immaterial that [★ 296] the principal is trustee of a charity, and manages its affairs by an agent, who receives the income, and has in his possession the title-deeds (*a*). Hence, where in such a case the agent was made a party to an information for an account and a scheme, Lord Romilly held on demurrer that he was not a proper party (*a*), inasmuch as the trustee was the person to be called upon to account.[1]

Sub-agent liable to agent.]—So, too, as a rule, when a sub-agent is employed by an agent, he is only liable to account to the agent, and not to the principal (*b*). A banker received a sum of money from A., who was the agent of B., C., and D.; A. being charged to divide it amongst them in distinct proportions known to the banker. Part of the money was drawn out and distributed by the agent, and Chief Justice Gibbs ruled that the banker was answerable to A. only. The action was brought by B. alone, Hence it would have been sufficient to say that he could not revoke a joint authority (*c*). A son employed under, paid by, and acccountable to his father, is not accountable to his father's principal (*d*).[2]

Effect of fiduciary relationship.]—Wherever a fiduciary relation exists between the principal and agent, the latter (as we have seen at p. 293) may be called upon to account in equity. Reciprocity of

(*a*) Attorney-General *v.* Earl of Chesterfield, 18 Beav. 596.
(*b*) Attorney-General *v.* Earl of Chesterfield, *supra*, and cases there cited.
(*c*) Pinto *v.* Santos, 5 Taunt. 447.
(*d*) Cartwright *v.* Hateley, 1 Ves. jun. 292; Le Texier *v.* Margravine of Anspach, 5 Ves. 322.

[1] Lake Erie R. R. *v.* Eckler, 13 Ind. 67. After death to his administrator. Simmons *v.* Simmons, 33 Gratt. (Va.) 451.

[2] Jackson Insurance Co. *v.* Partee, 9 Heisk. (Tenn.) 296; Reed *v.* Hunter, 49 Ga. 207; Louisiana &c. Trustees *v.* Duprey, 31 La. An. 305; Montgomery Co. Bank *v.* Albany City Bank, 3 Seld. (N. Y.) 459.

accounts is not an essential condition (*e*). As to commercial travellers and their liability to account, see *Hunter* v. *Belcher* (*f*).

In *Makepeace* v. *Rogers* (*g*), decided in 1865, a bill was filed by a landowner against a person whom he had employed as agent and manager of his estates, and whom he charged with having received moneys while acting in that employment, and with not having rendered proper accounts of those moneys. An account and delivery of documents belonging to the principal and in the possession of the agent was prayed. Vice-Chancellor Stuart, in overruling a demurrer, said: "I conceive that, wherever the relation between the person who seeks an account and the person against whom it is sought arises out of a fiduciary character, the fiduciary character of the employment imposes upon the person employed the duty of [★ 297] keeping accounts and of preserving ★ vouchers, and, according to the old law, a bill in such a case for an account in equity may be sustained." In the court above, where the vice-chancellor's decision was affirmed, Lord Justice Knight Bruce remarked that the fiduciary character of the relation between the parties sufficed to support a bill for an account.

An agent who has sold on credit will not be liable to account for the proceeds unless he acted without authority, or has received the proceeds, or ought to have received them (*h*).

Failure to account.]—An agent who fails to account is liable to forfeit remuneration for his labour (*i*). Mere irregularity, however, in the account will not suffice to work such forfeiture. If the agent can make out his claim by satisfactory evidence he will be paid (*i*).[1]

Injunction.]—An injunction to restrain the transfer of stock standing in the name of a steward was granted upon evidence that it was the produce of his master's property, and received for many years without account rendered; but refused as to money at the steward's bankers in his own name, the last payment having been made two years before the application to the court (*j*).

Title of principal cannot be disputed—Exceptions.]—It is a settled rule of law that an agent shall not be allowed to dispute the title of his principal. Hence, after accounting with his principal, and receiving money as agent, he cannot afterwards say that he did not receive it for the benefit of his principal, but for that of some other person (*k*).[2] So where a ship originally belonged to one of the part-

(*e*) Phillips *v.* Phillips, 9 Hare, 471; S. C., 22 L. J., Ch. 141, explained in Makepeace *v.* Rogers, 34 L. J., Ch. 396.
(*f*) 9 L. T. 501; 10 *ibid.* 548. (*g*) *Supra.*
(*h*) See Varden *v.* Parker, 2 Esp. 710; Alsop *v.* Silvester, 1 C. & P. 107.
(*i*) White *v.* Lady Lincoln, 8 Ves. 363.
(*j*) Lord Chedworth *v.* Edwards, 8 Ves. 47.
(*k*) See per Abbott, C. J., Dickson *v.* Hamond, 2 B. & Ald. 310.

[1] Smith *v.* Crews, 2 Mo. App. 269. See Sampson *v.* Somerset Iron Works, 6 Gray, 120, and Beall *v.* Janney, 62 Mo. 434.
[2] Placer Co. *v.* Astin, 8 Cal. 303; Osgood *v.* Nichols, 5 Gray, 420.

ners, and had been conveyed to A. for securing a debt, and A. became sole registered owner of the ship, and afterwards as agent for both partners insured the ship and freight and charged them with the premiums, the court held, on a loss happening, the money being paid to A. by the underwriters, that he was accountable to the assignees of the surviving partners for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged (*k*). The same rule applies in the case of brokers (*l*), warehousemen, and wharfingers (*m*). This ★ rule, [★ 298] however, is not of universal application, for the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount (*n*). A bailee has no better title than the bailor, and consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him (*o*). This exception to the rule must in its turn be distinguished from those cases where the estoppel proceeded on a representation by the agent, which was analogous to a warranty of title for good consideration to the purchaser (*p*). The principle that the *jus tertii* cannot be set up if the person to whom that right belongs does not set it up himself, only applies as between bailor and bailee (*q*), not to a stakeholder (*r*).

Right of bailee to set up jus tertii.]—In certain cases, then, a bailee set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against the bailor (*s*). After the filing of a liquidation petition the holder of a registered bill of sale, executed by the debtor, instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee, the auctioneer held possession for him, and ultimately by his directions advertised the goods for sale. The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee. The Court of Appeal, affirming the decision of Bacon, C. J., held that the money must be paid to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse

(*k*) See per Abbott, C. J., Dickson *v.* Hamond, 2 B. & Ald. 310.
(*l*) Roberts *v.* Ogilby, 9 Price, 269. (*m*) Betterley *v.* Read, 4 Q. B. 511.
(*n*) Biddle *v.* Bond, 34 L. J., Q. B. 137, and cases there cited; Dickenson *v.* Naul, 4 B. & Ad. 638; Cheesman *v.* Exall, 6 Ex. 346, per Martin, B.; Sheridan *v.* New Quay Co., 4 C. B.. N. S. 649; Shelbury *v.* Scotsford, Yelv. 22; Batteley *v.* Reed, 4 Q. B. 517; Thorne *v.* Tilbury, 3 H. & N. 537, per Pollock, C. B.
(*o*) Wilson *v.* Anderton, 1 B. & Ad. 450; Biddle *v.* Bond, *supra*.
(*p*) See Stonard *v.* Dunkin, 2 Camp. 344; Gosling *v.* Birnie, 7 Bing. 339; Howes *v.* Watson, 2 B. & C. 540.
(*q*) Per Lord Selborne, C., in Kingsman *v.* Kingsman, L. R., 6 C. P. Div. 122.
(*r*) *Ibid.*
(*s*) *Ex parte* Davies, *In re* Sadler, L. R., 19 Ch. Div. 86.

Profits made before agency.]—An agent cannot be compelled to account for profits which were made by him before the relation of principal and agent existed. Thus, where contracts were entered into by a person who knew that it was intended to incorporate a company to take them over, and who subsequently, upon the formation and incorporation of the company, became a director of the company, the Master of the Rolls held that the company was not entitled to claim the profits so made by the director previous to the incorporation of the company (*h*). This class of cases must be distinguished from those in which shareholders may proceed against the officers of a company under sect. 38 of the Companies Act, 1867 (*i*).

An agent is liable to have his settled accounts surcharged and falsified. The fact that the principal is allowed to surcharge and falsify will not entitle the agent to the same right as against the principal (*j*).

Profit made through sub-agent.]—It is immaterial that the profit is made by a sub-agent. In *De Bussche* v. *Alt* (*k*), which was decided by the Court of Appeal in 1878, the plaintiff consigned a ship for sale to A. The minimum price was fixed at $90,000, with the plaintiff's consent. A. employed the defendant to sell upon the similar terms. The defendant failed to sell, but took to her himself at the minimum price, and about the same time re-sold her to a Japanese prince for $160,000. Plaintiff did not know of the purchase by defendant, or of the re-sale by him, until June, 1869. The $90,- [★ 302] 000 was paid by ★ defendant to A., who remitted the sum to plaintiff; and eventually the defendant received the $160,000. The bill to compel defendant to account for the profit made by him on the re-sale was filed in 1873. Judgment was given for the plaintiff.

This case is also of use for the reference to the doctrine of acquiescence. It supports the proposition, that where a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release, or accord and satisfaction, must be shown, although on account of laches relief may be refused under special circumstances.

Sale by agent of his own property—Re-sale by principal.]—When an agent employed to purchase sells to the principal property of the former acquired by him when he was in no fiduciary relation to the principal, without disclosing the fact of his ownership, the latter may rescind the contract.[1] But suppose the property has been sold

(*h*) Albion Steel and Wire Co. *v.* Martin, 1 Ch. Div. 580.
(*i*) 30 & 31 Vict. c. 131; see Twycross *v.* Grant, 2 C. P. Div. 469.
(*j*) Mozley *v.* Cowie, 47 L. J., Ch. 271; 38 L. T. 908.
(*k*) 8 Ch. Div. 286.

[1] Tewksberry *v.* Spruance, 75 Ill. 187; Taussig *v.* Hart, 58 N. Y. 425.

by the agent to the principal at a large profit to the former, and that at the time the principal discovers the concealment of the agent's ownership it is impossible to obtain a rescission of the contract, by reason of intermediate dealings, has the principal any right to make the agent account for the profit made by him on the transaction? This question was raised in 1884 before Pearson, J., in *Re Cape Breton Co.* (*l*).[1] His lordship decided the question upon the grounds that if the principal declines to rescind, or if by reason of intermediate dealings with the property rescission has become impossible, he is not entitled to call on the agent to account for the profit which he has made by the sale—*i. e.*, either the difference between the price which he himself gave for the property and the price which he obtained from the principal, or the difference between the latter price and the market value of the property at the time of the sale to the principal. See Per Cotton, L. J., in *Re Ambrose Lake Tin and Copper Mining Co.* (*m*), per Malins, V.-C., in *Erlanger* v. *New Sombrero Phosphate Co.* (*n*), and per Lord Cairns (*o*), to the effect that the purchase of property with the view to the formation of a company does not make purchaser a promoter of the company ★ after it is formed. *In re Cape Breton Co.* (*p*) was fol- [★303] lowed, in 1887, by the Court of Appeal in *Ladywell Mining Co.* v. *Brookes* (*q*), and *Ladywell Mining Co.* v. *Huggons* (*r*).

Profits made by partner outside partnership.]—If a partner, who contracts that he will not engage in any other business than the partnership, does so, he will not be liable to account for the profits so made unless he has agreed to do so (*s*), unless that other business is within the scope of the partnership (*t*), although such partner may be liable to an action in damages for breach of the agreement, or to an injunction.

Commission agents and factors distinguished as to their liability to account.]—The liability of commission agents to account for profits made on consignments is different from that of a factor (*u*).

Facts precluding a right of action for profits.]—In considering whether a principal is precluded from bringing his action against the agent, the points to be considered are—

(1.) Has the principal ratified the agent's claim:

(*l*) 26 Ch. Div. 221.
(*m*) 14 Ch. D. 390, p. 398.
(*n*) 5 Ch. Div. 73, p. 91.
(*o*) 3 App. Cas. 1234–6.
(*p*) *Ubi sup.*
(*q*) 35 Ch. D. 400.
(*r*) *Ibid.*
(*s*) Dean *v.* M'Dowell, 8 Ch. D. 345.
(*t*) *Ibid.*; Somerville *v.* Mackay, 16 Ves. 382.
(*u*) Kirkham *v.* Peel, 43 L. T. 171; Knatchbull *v.* Hallett, 13 Ch. Div. 696.

[1] The decision in this case was affirmed in the Court of Appeal. 29 Ch. Div. 795. And in the case of Bentinck *v.* Fenn, 12 App. Ca. 652 (1887).

(2.) Has the principal acquiesced in the agent's claim within the rule laid down by Lord Cottenham in *Duke of Leeds* v. *Earl Amhurst* (*x*) :
(3.) Is the agent entitled to set up an accord and satisfaction :
(4.) Has the principal granted a release under seal : or
(5.) Is the principal by his conduct, amounting to laches or to an estoppel, precluded from enforcing his vested right of action (*y*).

(*x*) 2 Ph. p. 123; and see De Bussche *v.* Alt, 8 Ch. D. 286.
(*y*) See the judgment of the Court of Appeal in De Bussche *v.* Alt, 8 Ch. Div. 286.

★ CHAPTER III. [★ 304]

DUTIES AND LIABILITIES OF AGENT IN FIDUCIARY POSITION.

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SECT. 1.—*Fiduciary Relations generally.*

Meaning of terms "trustee," "fiduciary," "fiduciary relation."] —The terms "trustee" and agent" are frequently used in a loose way as though those terms marked off absolutely distinct and separate duties and liabilities. All trustees, however, are agents; but all agents are not trustees. A trustee is an agent and something more. An agent is simply one placed in the stead of another; he is a trustee only so far as there is vested in him for the benefit of another some estate, interest, or power in or affecting property of any description; and an agent, who is in a fiduciary position, is a trustee in this sense of the word; in other words, fiduciary and trustee are convertible terms. This will appear more clearly hereafter from the remarks of Lord Chelmsford in *Tate* v. *Williamson* (*a*), to which attention will be directed shortly. A fiduciary is one who holds anything in trust for another; a fiduciary relation is the relation in which a fiduciary or trustee stands towards the beneficiary; the term trustee being here used in its widest sense, which includes not only trustees in the narrow sense of the word, but also those persons who are, for certain purposes, trustees in the contemplation ★ of law. The relation is one of confi- [★ 305] dence; it was upon the principle of correcting abuses, of this confidence that the jurisdiction of equity was founded (*b*). We are not concerned here with considerations of the extent to which the principle ought to be applied, or of the questions whether the nature of the confidence reposed, or the relation of the parties between whom

(*a*) L. Rep., 2 Ch. 61.
(*b*) Billage *v.* Southee, 9 Ha. 534.

it has subsisted, makes any difference. The principle is of very wide, if not of universal, application, and has been applied in cases between a trustee and *cestui que trust*, guardian and ward, surgeon and patient, as well as in other relations (*c*). Wherever there is a relation which puts one party in the power of the other, there exists a fiduciary relation. Wherever two persons stand in such a relation that while it continues confidence is necessarily possessed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed (*d*).[1]

General rules as to the dealings of persons in fiduciary relations.]—No hard and fast precise rule is laid down for the regulation of the dealings of persons in a fiduciary position. Where the known and defined relation exists, the conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save whatever kindness or favour may have arisen out of the connection. Where, on the other hand, the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness, with its effects, and of undue influence exercised or unfair advantage taken, cannot be

(*c*) Huguenin *v.* Baseley, 2 W. & T. Lead. Cases, 556, and cases there cited. See too Allcaird *v.* Skinner, 36 Ch. D. 145, 1887.

(*d*) Per Lord Chelmsford, C., Tate *v.* Williamson, L. Rep., 2 Ch. 61. See Broughton *v.* Broughton, 5 De G., M. & G. 164.

[1] As where a gift was made by a widow to a church, the pastor of which, was her spiritual adviser. The gift was large in proportion to her means, and was obtained at the solicitation of the pastor only. She received no advice from other disinterested persons. She filed a bill in equity to have the gift set aside and recovered. Caspari *v.* First German Church, 82 Mo. 649, *S. C.*, 12 Mo. App. 293.

A conveyance between persons standing in the relation of parent and child or guardian and ward will be set aside on the ground of public policy. Browne *v.* Burbank, 64 Cal. 99.

A. and B. were engaged to be married. At the earnest solicitation of B., A. conveyed to her certain property. Afterward she refused to marry him. He brought an action to have the conveyance set aside, or a reconveyance to him. In the opinion of the case, the court said "in the negotiation the contest was unequal. A woman can always exercise an undue influence over the man she professes to love. We have no doubt that influence was exerted in this case." A re-conveyance was ordered. Rockafeller *v.* Newcomb, 57 Ill. 192.

A case of undue influence of wife over husband. See Turner *v.* Turner, 44 Mo. 535. See also Shipman *v.* Furness, 69 Ala. 555; Wistar's Appeal, 53 Pa. St. 63; Brock *v.* Barnes, 40 Barb. 521.

more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down,—any precise line drawn. If it were ★ stated that certain acts should be the only tests of un- [★ 306] due influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, it would be easy for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach. If anyone should say that a rule is thus recognized which from its vagueness cannot be obeyed because it cannot well be discerned, the answer is plain. All men have the interpreter of it within their own breasts; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves (*e*). A moment's consideration will suffice to show that the relation of principal and agent is a relation which may put one party in the power of the other to a greater or less extent according to the circumstances of the case. The confidence reposed in the agent might be abused with impunity in a variety of ways did not the doctrines of equity intervene. The rules which have been gradually formed for the regulation of the conduct of agents in fiduciary relations, and checking of breaches of confidence, proceed from principles of the highest importance in social as well as in commercial intercourse. In illustrating these rules, a convenient mode of dividing the subject may be attained by considering in their order cases where an agent is employed to buy or sell, where he receives a voluntary donation from his principal, and cases where he stands in the position of a legal adviser or a director. Before entering upon these questions it will not be amiss to cite a few cases by way of illustrating the nature of the evidence required in proof of a fiduciary relation.

Sale of freehold estate set aside.]—In *Tate* v. *Williamson* (*f*). A., a young man entitled to a moiety of a freehold estate, the whole of which brought in about 440*l.* a year, was pressed for payment of his college debts, amounting to about 1,000*l.* Being on bad terms with his father, he wrote to his great uncle, who had been the trustee and manager of the property, and receiver of the rents, for advice and assistance as to payment of the debts. The latter sent his nephew W., the defendant, to see A. on the ★ subject. [★ 307] When they met, A. would not permit any attempt to compromise the debts, but said he would sell his estate. W. then offered him 7,000*l.* for it, payable by instalments. This offer was accepted by A. next day. Before the signing of the agreement the defendant obtained a surveyor's valuation, in which the value of the mines under the entirety was estimated at 20,000*l.* A. was not informed of this valuation. Upon these facts it was held by Vice-Chancellor

(*e*) Per Lord Chancellor Brougham, in Hunter *v.* Atkins, 3 M. & K. 113, 141.
(*f*) L. Rep., 2 Ch. 55.

Page-Wood that a fiduciary relation existed between A. and W., and that the sale must be set aside. This decision was upheld by Lord Chancellor Chelmsford. The chief circumstances upon which the decree was founded appear to be the youth and embarrassments of A., the duties which the defendant had undertaken of advising him with respect to the arranging of the claims of his creditors, and the secret information obtained by the defendant.[1]

Secret retention of part of purchase-money by promoters.]—The promoters of a company, who make representations in a prospectus, and invite the confidence of the persons to whom it is addressed, contract fiduciary relations with such persons, and if they have bargained to retain part of the money subscribed, they must disclose that fact (*g*).

Bagnall v. *Carlton* (*h*) was considered by Jessel, M. R., in the case of *Emma Silver* v. *Mining Co., Limited* v. *Grant* (*i*), which was decided in 1879. In that case the vendors of a mine entered into an agreement with G. to sell the mine for 1,000,000*l.* to a company to be formed by G., who was to receive 20 per cent. of the amount of the capital which should be allotted. By a subsequent agreement between the vendors and the nominee of G., who was described as acting on behalf of the intended company, the vendors agreed to sell the mine to the company for 1,000,000*l.* The company was formed, but no mention was made in its prospectus or articles of association (which were settled by G.) of the first agreement. The present action was brought amongst other things, for an account of the sums received by G. under the first agreement, and an order that he might pay over those sums to the company. Two questions were dealt with, viz., Was G. liable to pay over any sum to the company? Secondly, if so, What sum? The first question was determined in the affirmative, by a consideration of the [★ 308] fiduciary ★ position in which he stood to the company.

(*g*) Bagnall *v.* Carlton, 47 L. J., Ch. 51; 36 L. T. 653, 730; 6 Ch. Div. 371.
(*h*) *Ubi sup.*
(*i*) 40 L. T. 804.

[1] A brother who had been and was at the time the confidential adviser of his sister. She lived in his family and had been sent to school and maintained by him. She owned a tract of land, given to her by him several years before attaining her majority. Being in contemplation of marriage she leased this land to him for five years; first three years free of rent and the last two at about one-half its value. On a bill filed by her and her husband, the court set the lease aside on account of the relation between the brother and sister at the time it was made; Gillespie *v.* Holland, 40 Ark. 28. An antenuptial contract, made between those who are engaged to be married, by which the intended wife released all her rights as widow, will be set aside, if it appears that any material circumstances were concealed from her at the time she entered into such contract.

In such cases the parties are not dealing at arm's length. They do not occupy the relation of buyer and seller. It is necessary that each should be frank and unreserved as to all matters contained in the contract; Kline *v.* Kline, 57 Pa. St. 120; see Shipman *v.* Furness, 69 Ala. 555; Turner *v.* Turner, 44 Mo. 535; Harkness *v.* Fraser, 12 Fla. 341.

As to the second question, the learned judge held that he was liable to pay to the company the balance of moneys received by him after deducting from all the receipts all the payments. If the profit is not a secret profit the promoter is not liable to refund it (*l*).[1]

Tenant for life; mortgagee.]—A tenant for life does not stand in a fiduciary relation towards the remainderman (*m*), nor does a mortgagee stand in an unqualified fiduciary relation towards the mortgagor,[2] For instance, he may purchase the equity of redemption from the latter (*n*), or from a prior mortgagee, who sells under a power of sale (*o*).

Surviving Partners.]—No fiduciary relation exists between a surviving partner and the representatives of his deceased partner (*p*).

(*l*) Whaley Bridge, &c. Co. *v.* Green, 5 Q. B. D. 109.
(*m*) Dicconson *v.* Talbot, L. Rep., 6 Ch. 32.
(*n*) Knight *v.* Majoribanks, 2 Mac. & G. 10.
(*o*) Shaw *v.* Bunny, 2 D. J. & S. 468; 33 Beav. 494; and Kirkwood *v.* Thompson, 2 D. J. & S. 613; 2 Hem. & Mill. 392.
(*p*) Knox *v.* Gye, L. R., 5 H. L. 656.

[1] The promoters of a company, incorporated for the purpose of mining coal and oil, purchased several thousand acres of land. They resold to the company at an advanced price. Their profits amounted to about $75,000. The promoters alleged that the purchase was direct from original owners. Held, the company was entitled to the profits made. Simons *v.* Vulcan Oil & Mining Co., 61 Pa. St. 202. To the same effect, see McElhenny's App., 61 Pa. St. 188.

Where A. and B. organized a company, in order that A. might sell his lands to the company and B. build a railroad upon them, neither of the promoters will be allowed to make any profit out of such transactions. All contracts made by them with the company will be jealously scrutinized and, unless they can show that the transaction was perfectly fair, it will be set aside on the application of the company. In Rice's App., 79 Pa. St. 168, Mr. Justice Paxson, in delivering the opinion of the court, said:—"While the rights of a stockholder to contract with his corporation and becomes its creditor, is conceded as a general proposition, the right of a person controlling a corporation to contract with it, rests upon entirely different principles, if it exists at all. Where a person has the actual control of a corporation, whether such control arises from the ownership of a majority of shares, or from his position or influence, and enters into a contract with such corporation, he is to be held to the most rigid good faith. The onus is upon him to show the fairness of the transaction, if it is called in question. It is a principle too well settled to be now successfully controverted that the promoters, directors or agents of a company, shall not make a profit out of it in buying lands for it, or in dealing with it. This principle runs through all the fiduciary relations."

One of a number of subscribers to a certain fund, being raised for the purpose of purchasing oil lands, was appointed trustee to receive all subscriptions and to take title to certain lands and leases in his own name to hold in trust for the company. He thereupon entered into a secret agreement with the vendors of the land, by which he was to receive a commission on the whole amount of subscriptions. Afterwards the company filed a bill to obtain from him the money received from the vendors. Held, he could make no profit or obtain an advantage to himself which was inconsistent with the interests of his principals. Collins *v.* Case, 23 Wis. 230.

[2] If a mortgage is given, conveying the legal title to the mortgagee, and a bill is subsequently filed to foreclose it, the mortgagee has a right to purchase and hold for his own account the property, when sold at a fair judicial sale. He will hold it subject to no other trust except to pay the surplus, if any, to the mortgagee. Wright *v.* Ross, 36 Cal. 414.

Land agent; banker; servant.]—With respect to the existence of such a relation between landowner and the agent of his estate, see *Makepeace* v. *Rogers* (*q*); a banker and his customer, see *Foley* v. *Hill* (*r*); a master and his servant, see *Smith* v. *Leveaux* (*s*).

Purchase by solicitor whose name is on particulars of sale.]—In *Guest* v. *Smythe* (*t*) an attempt was made to set aside a purchase on the ground that a fiduciary relation existed between the parties to the sale. The purchase was made by W., a solicitor, in an auction, consequent upon a foreclosure suit. W.'s name appeared on the particulars of sale as one of several solicitors from whom particulars of sale could be obtained. He was solicitor not to any party in the suit, but to some creditors of the mortgagee, one of whom had obtained a decree for administration of G.'s, the mortgagee's, estate. W. neither prepared the particulars of sale, nor was he consulted about them, nor had he anything to do with fixing the reserved bidding. He neither knew nor had the means of knowing anything about the amount of the bidding. Two days before the sale W. had taken out a summons for the plaintiff in the administration suit to attend proceedings in the foreclosure suit. [★ 309] This summons ★ was returnable on the day after the sale. Lord Romilly, M. R., being of opinion that the case was governed by the principle laid down by Sir John Leach in *Grover* v. *Hügald* (*u*), decided that W. was representing the creditors in the cause, and that as they could not in their character of creditors have appointed a person to purchase the property without the leave of the court, he was not able to buy. His lordship's judgment was reversed in the Court of Appeal. "The case is of considerable importance," said Sir G. Giffard; "on the one hand it is of great importance that the rules of the court on this subject should in no way be relaxed; but, on the other hand, it is equally important that sales by the court should not be more easily impeached than ordinary sales. As regards the rules of this court, it is, of course, well-known that a person who has the conduct of a sale under the direction of the court cannot himself buy; and of course it is equally well-known that parties to the suit cannot buy without the special leave of the court; and because they cannot buy, their solicitor also cannot buy. There are also other well-known rules, such as that a trustee for sale, an assignee under a bankruptcy, or the solicitor of an assignee, cannot buy. If I thought that this case came within any of those well established rules, I should undoubtedly affirm the decision under appeal." The learned judge, on the contrary, thought that if the decision were affirmed the rules would be carried to such an extent as to make it difficult to say where the court is to

(*q*) 34 L. J., Ch. 396.
(*r*) 2 H. L. C. 28.
(*s*) 2 D. J. & S. 1.
(*t*) L. Rep., 5 Ch. 551.
(*u*) 3 Russ. 428.

stop. With respect to the particular grounds upon which the Master of the Rolls based his decision, his lordship proceeded: "Can I possibly say that persons in the position of the creditors of G.—who had nothing to do with the preparation of the particulars, and who were not consulted in any degree—can I say that they would be precluded from purchasing? If they were not precluded from purchasing, why should their solicitor be precluded, this application being not by them against their own solicitor, but by parties in the cause, who had all the means of seeing that the particulars were properly prepared, and all the means of seeing that a proper reserved bidding was fixed, and that the sale was properly conducted?" The argument that no solicitor whose name appears as one from whom the particulars of sale may be obtained was very quickly disposed of. His lordship thought it neither ★ es- [★ 310] sential for the ends of justice, nor requisite for the purpose of ensuring a fair sale, that if one of the solicitors referred to as a person who will supply particulars or conditions of sale—although he had neither been consulted, nor had any right to interfere with the conduct of the sale, and although he was not responsible—happen to bid, the sale may be set aside by parties to the suit, even after the confirmation of the purchase (*y*).

The relief given is not co-extensive with the promptings of honour.] —The reasoning with which Lord Thurlow begins his judgment in the important case *Fox* v. *Mackreth* (*z*) cannot be too carefully studied upon this subject: "I do not agree," said his lordship, "with those who say that wherever such an advantage has been taken in the course of a contract by one party over another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case; suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a court of equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise such a principal must extend to every case in which the buyer of an estate happens to have a clearer discernment of its real value than the seller. It is, therefore, not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information, but it is also necessary to show some obligation binding the party to make such a disclosure." The existence of a fiduciary relation implies the existence of obligation. In other words, there can be no fiduciary relation where there is no obligation. The relief given is not co-extensive with the promptings of honour.

(*y*) Per Sir G. Giffard, at p. 558. (*z*) 2 B. C. C. 420.

Profits on re-sale of colliery—Dealings at arm's length.]—Vice-Chancellor Bacon dealt, in *The Chesterfield and Bythorpe Colliery Company* v. *Black* (*a*), with that branch of law, the application of which determines whether the dealing of a person who has occupied a fiduciary position has taken place under such circum-[★311] stances ★ as render such dealing valid and binding upon the *cestui que trust*. The facts of the case may be thus briefly stated. Two of the directors of the plaintiffs' company bought an adjoining colliery for 53,000*l*., and being about to offer it for sale for 100,000*l*., were asked by the plaintiffs' secretary to give the first offer to the plaintiffs' company. The subject was afterwards mentioned at a board meeting. In order, however, to enable the negotiations to proceed, one of the two directors resigned his post, at the suggestion, it was alleged, of the company's solicitor, and purchased the moiety of the other, on the terms that the payment was to be half the sum given by the plaintiffs' company. The offer having been made to the company, the plaintiff's engineer was sent to inspect and report. He valued the colliery at 173,000*l*., and a full investigation into the state and condition of the property was made by the directors. A meeting of the shareholders was subsequently called, and a resolution unanimously passed, authorizing the directors to purchase of the former director for 100,000*l*. The purchase was completed in December, 1873. The directors and shareholders knew that the defendants had a joint interest, and that a profit was being made on the re-sale to the company, but no inquiry was made as to the price given by the defendants. The present action for an account of profits was commenced in December, 1875, the plaintiffs' alleging that the sale of his interest by the director who retained office was a mere contrivance to give an assumed validity to the sale, and that he had concealed his real interest in the colliery at the time of the sale to the company. They relied upon *The Imperial Mercantile Credit Association* v. *Coleman* (*b*), which contained certain dicta to the effect that it is necessary for a person in a fiduciary position to say not merely that he has an interest, but to state exactly what is his interest. His lordship, however, whilst agreeing with the proposition that a person in a fiduciary relation is not at liberty to make a bargain, or enter into any relation with his *cestui que trust* by which he might gain a profit, thought the case decided in the House of Lords inapplicable, inasmuch as the defendants had, by their conduct in the transaction, shown that they had dealt with the plaintiffs' company at arm's length, and had made no mis-[★312] representation. The weak point in the defendants' ★ case is undoubtedly the fact that the director who remained in office had an interest in the purchase in conflict with his duty, but even here

(*a*) 37 L. T. 742; 24 W. R. 783.
(*b*) L. Rep., 6 H. L. 189.

there was no concealment, and the other circumstances of the case are consistent with *uberrima fides*.[1]

Official liquidators are fiduciaries.]—Official liquidators, who are placed in a fiduciary relation towards the creditors and shareholders, are bound like other agents faithfully and honestly to perform their duty, and to abstain therefore from placing themselves in a position in conflict with their duty. In *Re Devonshire Silkstone Coal Company* (*b*), a motion was made to remove the official liquidators of the company. The charge was that they had sold the colliery and property for 8,000*l.*, although they were worth at least 40,000*l.*; and that by taking shares in the new company, which had been formed for working the Devonshire Colliery, they had rendered themselves incapable of fulfilling their duties to the shareholders and creditors of the old company. The evidence showed, however, that no higher price could be got at the time of the sale; that the purchaser was acting independently of any connection with the liquidators; that publicity had been given to the intention to sell; that only two of the liquidators had taken any shares; that the large profit realized arose solely from the unexpected and unprecedented rise in the price of coals, and that six years had elapsed since the sale. The application was heard by Malins, V.-C., and was successful.

Debtors Act, 1869, s. 4.]—Lastly, it may be noted that persons acting in a fiduciary capacity who fail to pay any sum in their possession or under their control, after an order for payment has been made (*c*), are liable to attachment. For cases illustrating this liability, see *Crowther* v. *Elgood* (*d*).

SECT. 2.—*Agent employed to purchase.*

Division of subject.]—The cases that have reference to the fiduciary relation of agents employed to make a purchase may be classed for convenience into three classes, according as they ★ refer to different sets of circumstances in the conduct [★ 313] of the agent:

(1.) Where the agent prevents the principal beneficiary or *cestui que trust* from purchasing property, and purchases it himself for the purpose of gaining a profit for himself:

(2.) Where the agent sells his own property to the principal *cestui que trust*, or beneficiary, but conceals the fact that it is his own:

(*b*) W. N. p. 71, March 23, 1878.
(*c*) See the Debtors Act, 1869, s. 4, and the Debtors Act, 1878, s. 1.
(*d*) 34 Ch. D. 691; 56 L. J., Ch. 416.

[1] See *ante*, page 308, note. Simons v. Vulcan Oil Company, 61 Pa. St. 202.

(3.) Where the agent is expressly authorized to buy, and he does so at a certain price, and then misrepresents to his principal what has been done, thereby gaining for himself a profit in the transaction.

Purchase by such agent on his own behalf.]—The restrictions imposed by law upon all transactions of the nature here indicated are founded upon the principle that no agent shall place himself in a position in which his duty and interest are in conflict,—in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal, since it is the plain duty of every agent to do the best he can for his principal (*e*). An agent who is employed to make a purchase for his principal will not be permitted either to purchase for himself or to make a feigned purchase for his principal from himself without the consent of his employer. If such an agent becomes a purchaser for himself, he will be considered as a trustee for his principal. Thus, where an attorney, employed to buy an estate for his client, contracted in his own name, and insisted upon retaining his purchase, the Master of the Rolls made a decree declaring the defendant a trustee for the client of all the right and interest he had acquired in the estate (*f*). The reason of the rule is a matter of easy inference from the observations of Lord Cottenham in *Reed* v. *Norris* (*g*): "Why," said his lordship, "is an agent precluded from taking the benefit of purchasing a debt which his principal was liable discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less [★ 314] than the whole amount, it ★ would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he made an assignment of the debt, and so made himself a creditor of his employer to the full amount of the debt which he was employed to settle."[1]

(*e*) See Bentley *v.* Craven, 18 Beav. 76.
(*f*) Lees *v.* Nuttall, 1 Russ. & My. 53; 1 Taml. 282.
(*g*) 2 My. & Cr. 374.

[1] If executors should purchase notes of a bank at a discount and with them pay off a debt due by the testator to the bank, the estate and not the executors will be entitled to the discount. Haeger's Ex.'s, 15 S. & R. (Pa.) 65.

Where a trustee buys in an outstanding title, and advances money for that purpose, it will be considered a purchase for the benefit of the *cestui que trust*, and not for himself. He, however, will have a lien on it, until paid for such advancement. King *v.* Cushman, 41 Ill. 31.

An attorney-at-law, having mixed funds of an assignee which were in his possession, with his own funds purchased assigned real estate at a sheriff's sale; he subsequently sold the same at an advanced price. Held, the estate was entitled to the profits received by the resale. Frank's Appeal, 59 Pa. St. 190.

In the absence of an agreement between the principal and agent, the latter may purchase, with his own funds, at a sheriff's sale, instituted by third persons, the reversionary estate in the hands of the principal. Kennedy *v.* Keating, 34 Mo. 25.

Purchase by promoter's solicitor.]—In *Tyrrell* v. *The Bank of London* (*h*), a case decided in 1862, the above principle was abundantly and fully affirmed. T. acted as solicitor for the promoters of an intended company. It was understood that he should be the solicitor of the new company when formed. Although employed in this capacity, he entered into an arrangement with R., who had purchased some property suitable for the company, for the sum of 49,200*l.*, that the speculation should be on their joint account; and that all negotiations relating to the property should be in the name of R. alone, T.'s name being kept secret. The company, knowing nothing of T.'s interest, acted upon the advice of the firm of which he was a member, and purchased from R. a portion of the property for 64,500*l.* The profit was divided between R. and T. When the company learnt the circumstances of the case, they claimed the profits made by T. upon the transaction, as profits made in the course of his agency. The House of Lords decided unanimously that the company were entitled as against T. to the benefit of his contract with R., so far as related to the premises sold to them. Lord Chancellor Westbury, having expressed an opinion that the case rested on very clear principles, the application of which it would be in the highest degree mischievous to weaken, went on to say, "In my view of the case, it is only necessary to ascertain that at the time when the appellant agreed to take from R. one-half of his purchase, he (the appellant) was acting in the capacity of solicitor to the respondents, and that he had advised, or intended to advise, his clients to purchase that part of the property which was ultimately bought by the clients. It is, I think, immaterial whether a solicitor had, before his own contract, advised the client to buy, and the client had agreed to act under such advice, or whether the solicitor intended only to give the client such recommendation, if in the result we find the client buying the property whilst acting under the advice of the solicitor. The consequence ★ is, [★315] I think, the same, namely, that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the full benefit of the best exertions of the solicitor. The relation of solicitor and client involves, of course, the relation of principal and agent. The duties of the first relation include all those of the second, and something more." Lord Cranworth having acquiesced fully in the principles stated by the Lord Chancellor, pointed out another *ratio decidendi*: "There has appeared to me from the beginning," said the learned lord, "to be one short ground upon which this case might rest. Throughout the whole of the dealings and the negotiations for this purpose T. represented to his clients, the company, that R. was the sole owner of the property. To that representation the company are entitled to hold him bound." The decision in the leading case of *Fox* v. *Mackreth* (*i*) is a good illustration of the

(*h*) 10 H. L. Ca. 26; 31 L. J., Ch. 369.
(*i*) S. C., 4 Bro. P. C. 258; Cox, 320.

principle upon which the court will proceed in investigating alleged violations of fiduciary duties.[1]

The above cases are sufficient to show the solicitude of our courts for the interests of persons who, from the relations existing between themselves and others, are forced to trust to the good faith of those others; wherever there exists a relation between any individuals by reason of which one is placed in a position of advantage over the other or others, the court will be vigilant in watching and controlling transactions between them. This principle is so fully recognized in its application to purchases by an agent as to render unnecessary any elaborate consideration of the authorities.

Secret profits made by agent employed to purchase.]—An obvious deduction from the general principle that an agent will not be allowed to make a secret profit out of the conduct of his agency is, that an agent employed to purchase will not be allowed to sell to his principal at a higher price than he gave himself. This principle is well established.

Purchase and sale of mine.]—In *Hitchins* v. *Congreve*. (*k*), decided in 1828, the bill prayed, amongst other things, that the defendants might be ordered to pay to the plaintiffs the sum of 15,000*l.* The owner of some mines proposed to Sir W. Congreve, in June 1824, the formation of a joint-stock company for working [★316] the mines. In the same month a memorandum of ★ agreement in accordance with the above object was drawn up, but not signed, the owner of the mine stipulated that he would treat with no other parties until it should be found impracticable to form a company. The terms of purchase were afterwards put into writing. By them the owner was to receive 10,000*l.* and one-fifteenth of the profits of the concern, besides a thousand shares in it. C. and two others, who took part in the undertaking to form a company, arranged between themselves that the mines so purchased should be charged to the company at 25,000*l.*, and that the surplus over 10,000*l.* should be divided amongst them. In the second agreement of purchase from the owner of the mines it was stated that the mines had been assigned to a nominee of C. and the others, and that they, by such nominee, had agreed to sell them to the intended company for 25,000*l.* This, it was contended, was totally untrue. A demurrer to the bill was overruled by Sir Anthony Hart, V.-C. His honour's decisions was, on appeal, confirmed by Lord Chancellor Lyndhurst. "Upon the face of this bill," said his lordship, "I cannot help considering the transactions stated in it to be fraudulent . . . The object (of the negotiations for purchase of the mines) was that they might be conveyed to a company by whom they were to be worked, and the company was to consist not

(*k*) 4 Russ. 562.

[1] Simons *v.* Vulcan Oil Co., 61 Pa. St. 202; McElhenny's Appeal, 61 Pa. St. 192; Collins *v.* Case, 23 Wis. 230; Rice's Appeal, 79 Pa. St. 204, *ante* 308, note.

of Congreve and the Clarks alone, but of a considerable body of shareholders. It appears that in the course of these negotiations Congreve and the Clarks became desirous of making a profit out of the original transaction for the purchase of F.'s the owner's, interest in the mines. The first plan which occurred to them was that a conveyance for the sum of 10,000*l.* should be made to persons nominated by them, who were afterwards to convey to the company for 25,000*l.* If such a transaction had taken place, and the particulars had been concealed from the company, it could not have been sustained." The defendants appear to have been aware of this, and the proceedings took another form. "The plan now adopted was this—that a conveyance should be executed directly from F. to trustees for the company, and although F. had agreed to convey the property for 10,000*l.*, that in this conveyance it should be stated that the purchase-money was 25,000*l.*, in order that the difference might be put into the pockets of Sir W. Congreve and the two Clarkes, and some other individuals whom they might choose to nominate. Such a transaction is so incorrect that it is quite impossible that ★ any court of justice should permit it to stand; and [★ 317] if after the conveyance had been so made, reciting that the price paid to F. was 25,000*l.*, a company of shareholders was formed, who acted upon that representation, they could in justice be chargeable only with the money actually paid to F., and if a larger sum was taken out in their funds, they would be entitled to call on the individuals into whose hand it came to refund it."

Sale of shares.]—The case of *Kimber* v. *Barber* (*l*), decided in 1872, shows in the clearest manner the extent to which the above principle will be carried. The plaintiff, defendant, and others wished to reorganize a company, and become directors. The defendant, aware that the plaintiff would soon require the qualifying number of shares, wrote on the 13th January, 1870, to J., the owner of certain shares, asking, as for a friend, whether he would sell his shares. On the 17th of this same month the agreement to purchase 264, at 2*l.* each, was completed, and a blank transfer sent by J. to the defendant. On the 19th the defendant called upon and told the plaintiff that he knew of 264 shares for sale at 3*l.* The plaintiff then authorized the defendant to buy them at that price. Before coming into court the plaintiff had transferred 210 out of the 264 shares. When the circumstances of the transaction became known to the plaintiff he filed a bill praying for a declaration that he was entitled to the benefit of the purchase of the 264 shares from J., or otherwise that the sale of the shares might be set aside. Lord Romilly, Master of the Rolls, was of opinion that the case was governed by *The Great Luxembourg Railway Company* v. *Magnay* (*m*). His lordship refused either relief prayed for in the bill; the first, because to accede to it would be to make a new con-

(*l*) L. Rep., 8 Ch. 56.
(*m*) 25 Beav. 586.

tract for the parties; the second, because the plaintiff by transferring a number of the shares had rendered it impossible to restore the parties to the position in which they were before the suit. This judgment was reversed by Lord Chancellor Selborne. "To my mind," said his lordship, " . . . this is a very clearly established case of agency. That being so, I see no difficulty in the relief which is asked by the first part of the prayer. It seems to me the common relief, the relief which was given in *Hitchins* v. *Congreve* (*n*), *Tyrrel* v. *Bank of London* (*o*), and in other cases too numerous to [★ 318] mention. It is ★ unneccessary to inquire, therefore, whether, if I had been obliged to consider the alternative part of the prayer, I should have been pressed with the difficulties which weighed upon the Master of the Rolls. I will not go into that matter further than to say that, as it appears to me, the case of *The Great Luxembourg Railway Company* v. *Magnay* (*p*) is, assuming it to be well decided, a case in its circumstances very different from the present case. On the view which I take of the facts in this case, there is no difficulty in granting the relief sought by the first portion of the prayer." The case here referred to by the Lord Chancellor will be made the subject of comment in another place.

Concealment of material facts by agent employed to purchase.]—One of the established rules of law is that where an agent is employed to make a purchase there must be *uberrima fides*. The latter must know the circumstances under which he is dealing. If the agent is in a situation which is not fairly disclosed to the other, it is only reasonable to say that if the knowledge of that situation would have prevented the other from confiding in his judgment and advice, or acting upon or adopting it, transactions between them would be set aside (*q*). Hence the dealings of an agent with his principal will not in any case be deemed valid, unless they are accompanied with the most entire good faith, and unless there is a full disclosure of all facts and circumstances as well as an absence of all undue influence, advantage, or imposition (*r*).[1]

Purchaser relieved where the sale to agent was nominal.]—The first case to which reference will be made is that of *Rothschild* v. *Brookman* (*s*), decided by the House of Lords in 1831. Sir L. Shadwell, V.-C., relieved a purchaser from certain sales and pur-

(*n*) 4 Russ. 562.
(*o*) 10 H. L. Ca. 26.
(*p*) *Supra*.
(*q*) See per Lord Wynford in Rothschild *v.* Brookman, 5 Bligh. N. S. 202.
(*r*) Story, Eq. Jur. 315, and cases there cited.
(*s*) 2 D. & C. 188; 5 Bligh. N. S. 165.

[1] An agent, employed to examine and ascertain how much and what part of the lands of his principal can be sold without inconvenience, and make a report of his proceedings to his principal, cannot after such examination purchase the property himself; Cumberland Coal & Iron Co. *v.* Sherman, 30 Barb. (N. Y.) 553.

chases. Upon the motion of Lord Wynford, the House of Lords affirmed the decree without calling upon the respondent's counsel. Although the proceedings in that cause were of a most voluminous character, the material facts are of the simplest kind. The respondent, who lived at Southampton, wrote to the appellant for his advice with respect to dealings in the funds. He stated that he had 20,000 livres of rentes. The appellant then advised him to sell them, and purchase Prussian bonds. ★Now comes [★ 319] the part of the transaction which is important in the present question. Acting upon the suggestions of the appellant, the respondent employed him to purchase accordingly. Accounts of the transaction were thereupon transmitted to him by Rothschild, with brokers' notes, as if the purchase had been made from third parties. From the evidence it was clear that no stock or bonds were purchased; neither were any transfers made, nor brokers' notes passed. There had been no more than a nominal sale of stock and bonds which belonged to the appellant. Upon the general question of the jealousy of the law where a fiduciary relation exists, Lord Wynford remarked, "That he has acted in most of these transactions under the advice of Mr. Rothschild cannot be denied. But I do not mean to say that Mr. R. gave him that advice with any dishonest view whatever; I have no doubt he acted fairly and properly . . . but the law which your lordships are to administer is a law of jealousy; it will not allow any man to be trusted with power that will give him an opportunity of taking advantage of his employer." "With respect to the purchase," it is observed by the same learned lord, "Mr. R. says, 'Buy Prussian bonds;' if he had gone into the market and bought, it would have been all right; he must have paid for those Prussian bonds according to the market price; but instead of that, Mr. R., being in possession of the Prussian bonds, sells his own Prussian bonds, and makes it appear like a transfer which had taken place in the market to the respondent." Sir E. Sugden, who had been one of the counsel for the respondent, when commenting upon the decision in his work upon the Law of Property (p. 663), expresses satisfaction at the decree, but mentions that from the novelty and the very complicated nature of the case it was considered a subject of regret at the time that it did not undergo more examination in the House of Lords.

Purchase—Sale by stockbroker of his own shares—Proof of fraud or loss unnecessary.]—In *Gillett* v. *Peppercorn* (*t*), decided in 1840, the authority of *Rothschild* v. *Brookman* (*u*) was manifestly applicable. The defendant, a stockbroker, was employed by G. to buy some canal shares. These shares were transferred to the plaintiff by three persons, from whom apparently the defendant purchased them for the plaintiff. The plaintiff, however, discovered after the transfer that at the time of the ★ sale the shares belonged [★ 320]

(*t*) 3 Beav. 78.
(*u*) *Supra.*

actually to the defendant, and that they had been transferred into the names of the apparent vendors as trustees, for P. The purchases were made in May, 1826, December, 1830, and January, 1831. The discovery was made in 1837, and in 1838 a bill was filed to set aside the transactions. There was no evidence of an extravagant price being charged, or of any intended fraud. Lord Langdale, M. R., thought the question a very simple and short one. "I am of opinion;" said his lordship, "that these transactions cannot be supported; not only are they in themselves so extremely likely to lead to the commission of fraud, as to make them directly against the policy of the law, but in those cases which have occasionally come to the knowledge of the court, and which fortunately have not been frequent, it has invariably been found that fraud has been the result of such transaction. It is not necessary to show that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff that the transaction cannot, in the contemplation of this court, be considered valid." Here, again, the fiduciary position of the agent is beyond doubt. Lord Justice James stated the rule of law in a recent case (*x*) to be that if one person invites another to join him in purchasing what really belongs to the former, and does not disclose that fact, the pretended purchase and sale cannot stand. [1]

The plaintiff may render relief impossible.]—Sir John Romilly, M. R., decided, in 1858, *The Great Luxembourg Railway Company* v. *Magnay* (*y*), in which a new element was introduced, namely, a sale by the plaintiff after the purchase. The plaintiffs granted to a director a sum of money to enable him to purchase the "concession" from the Belgian Government of another line. The director proved to be the owner of the concession. Though he presided at the meeting of shareholders at which the money was granted, he kept the fact of his ownership secret. He obtained from the Belgian Government a transfer of the concession to the plaintiffs' company. In 1856, the plaintiffs filed a bill against the defendant. In the [★ 321] same year, and pending the ★ suit, the plaintiffs sold the concession for the amount granted to the defendant to purchase it. This latter circumstance was, in the opinion of the Master of the Rolls, sufficient to disentitle the plaintiffs to any claim to relief; the relief claimed being an account against the defendant of the shares, 500 in number, granted for the purchase of the concession, and of his application thereof, the plaintiffs being willing to make all just allowances.

Magnay's case *examined.*]—The argument upon which his lord-

(*x*) New Sombrero Phosphate Company *v.* Erlanger, L. R., 5 Ch. Div. 73.
(*y*) 25 Beav. 586.

[1] Gould *v.* Gould, 36 Barb. (N. Y.) 270.

ship's judgment was based may be thus stated:—A director is a trustee for the shareholders in regard to all matters entered into on their behalf; hence he cannot personally derive any benefit from any contract entered into for the company. If, when employed to purchase, he sells his own property to the company, the company have a right either to adopt the transaction or to repudiate it, but the adoption must go to the whole transaction. In this case the plaintiffs framed their bill upon the assumption that the whole transaction was to be set aside, and that the defendant ought to account for the money he had received in respect of the shares assigned for the purchase of the concession. What relief can they demand under these circumstances? This question led the learned judge to consider the meaning of the proposition that an agent or trustee cannot retain any benefit from such a transaction. No doubt if a director of a company enters into a contract for the purchase of a quantity of iron rails, but before they are wanted and before they have been actually delivered, the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered, and that at which it was purchased. "But suppose," he continued, "an iron smelting company were desirous of buying an adjoining estate which contained limestone rock, which was essential to enable them to smelt their iron with success, and that the trustee undertook to buy it for them, concealing the fact that it was his own estate, and if he then sell it to the company, of which he is a director, for double its value, the court will not allow the transaction to stand. If we say to the company, 'You may either repudiate the bargain altogether, or you may adopt it if you think fit,' but if, from any circumstance whatever, it becomes impossible to return the estate, all that the trustee would be entitled to would be the full value of the estate sold; but when it is said that he cannot ★ make any profit by the [★ 322] transaction, it is not meant that he is not to have the proper value of the property which is actually taken and adopted by the company; nor does it mean that he is to give up his own property to the company, although he has given no valuable consideration for it." But it is a principal of equity to endeavor to place the parties in exactly the same situation as they were before. The introduction of that principal was impossible here, owing to the sale of the concession by the plaintiffs; therefore "no relief," said the Master of the Rolls, "can be given to the plaintiffs, because they have rendered it impossible." The decision of Sir J. Romilly amounts to this, that where an agent sells to his principal property for which he has given no valuable consideration, the principal cannot retain the property unless he pays its proper value (*z*). Some doubt seems to be thrown upon the decision itself by Lord Selborne (*a*), but probably the doubt is due to the general terms in which the decision is framed.

(*z*) See Lindley on Partnership, pp. 604, n. (*e*), and 605.
(*a*) Kimber *v.* Barber, L. R., 8 Ch. 59.

SECT. 3.—*Fiduciary Relations where the Agent is appointed to sell.*

General rule.]—The policy of the law is to prevent any person placing himself in a position where his interests conflict with his duty. If it is the duty of one individual to act for another, he must act in perfect good faith. He cannot take advantage of a confidence reposed in him. He cannot enrich himself by a violation of his duty in the smallest particular. The cases in the reports upon the present question are very numerous.

Purchase by trustee for sale—Resale by him.]—*Fox* v. *Mackreth* (*b*), finally decided in 1798, is the leading authority. It is so not so much because it contains the enunciation of new principles, as because the law relating to the duties of trustees for sale towards the beneficiaries is very fully discussed in the arguments and judgment. The facts of the case, so far as they are here necessary, may be briefly stated. The plaintiff had various dealings with the defendant. Their first transaction appears to have been in 1777, [★ 323] shortly after the plaintiff came of ★ age. Being pressed for money he obtained from the defendant the sum of 5,100*l.*, and granted two annuities of 500*l.* and 350*l.*, each for his life. In the same year, being again in difficulties, and threatened with arrest, the plaintiff mortgaged his Surrey estates to Mackreth for the sum of 3,000*l.* Mackreth, D., his friend, and F., acted as trustees for payment of the debts, and redeeming the annuities. About the same time the plaintiff gave to Mackreth a rental of the Surrey estate, and a valuation of the whole, amounting to 45,000*l.* The latter sent down a man to inspect the property. There was no proof of the amount of his valuation, or of his having communicated it to Mackreth. The next step was the preparation of a trust deed by which the estates were conveyed to Mackreth and D. in trust to sell or mortgage the same, and pay the debts and redeem the annuities granted by the plaintiff. Before the execution of the trust deed an ineffectual attempt was made by the defendant to purchase the Surrey estate for 39,500*l.* The trust deeds were then executed. Soon afterwards, the defendant's offer of 39,500*l.* was accepted on condition that he subjected himself to the payment of the plaintiff's mother's jointure in case she survived. The purchase money was to be paid not later than the 25th of March. After conveyance of the estate to the defendant, he gave to the plaintiff a common accountable receipt for 28,403*l.*, the rest being retained by him in satisfaction of debts of the plaintiff. The latter objected to the security, whereupon the defendant charged his estates in Surrey with the payment of the 28,403*l.* with interest. He had no other such estate than that purchased by him of the plaintiff. On the 21st of March the defendant had sold the estate for 50,500*l.* Sir Lord Kenyon, M. R., decreed that undue advantage had been taken by the defendant of the confidence reposed in him, and that he should be con-

(*b*) 2 Bro. C. C. 400; 2 Cox, 320.

sidered as a trustee of the estate. The case was accordingly referred to the Master to take an account of the money received by the defendant from his purchaser, and to compute interest thereon at five per cent. from the time of its receipt. An injunction also was granted to restrain the defendant from proceeding at law touching any matter in question in the cause. Lord Chancellor Thurlow affirmed this decree, though not without a long deliberation; it was also upheld by the House of Lords (*c*). In reference to the conduct of Mackreth ★ in bargaining for the estate and beating [★ 324] down the price, Lord Thurlow observed: "The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger? . . . If a trustee, though strictly honest, buys an estate himself, and then sells it for more, yet according to the rule of a court of equity, from general policy, and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes. It is not, therefore, in that view that Mackreth, being called a trustee, can operate. It does not rest on the name of a trustee, or in the legal or equitable selection of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a juryman, pronounce that Fox agreed to the price, trusting that Mackreth knew the price, and represented it fairly to him. If A. says to B., I know the value of the subject, and if you will trust me, I will fairly tell you what it is worth, and A. at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against, not because A. is a trustee, but because he stipulated with B. to tell him fairly the value, and he broke that stipulation; and then, to be sure, it makes as strong a case as that of a trustee." There was plainly much doubt in the mind of the Lord Chancellor with respect to several points discussed in the judgment. For instance, he dissolved the injunction, though he afterwards acknowledged he was wrong in doing so (*d*).[1]

Use of another name by agent.]—The fact that the agent has

(*c*) 4 Bro. P. C. 258, Toml. edit.
(*d*) *Ex parte* Lacey, 6 Ves. 626.

[1] If a trustee or a person acting for others sells real estate, and has an interest, himself, in the purchase, the *cestui que* trust, may at his option have the sale set aside, and have the property put up for sale the second time. And it makes no difference in the application of this rule, that the sale was at public auction, *bonâ fide* and for a fair price and that the trustee did not purchase for himself. Davone *v.* Farming, 2 Johns. Ch. 252.

A trustee cannot convey a portion of the trust property to his wife to hold for his use and benefit, and to hold it as security for advances made by him in the execution of his trust. Clark *v.* Lee, 14 Iowa, 425. See, also, Smith *v.* Townsend, 27 Md. 368; Clark *v.* Deveaux, 1 S. C. 177; Spencer's App., 80 Pa. St. 332; Griffith *v.* Godey, 113 U. S. 89; Michond *v.* Girod, 4 How. (U. S.) 503; Freeman *v.* Harwood, 49 Me. 195; Shelton *v.* Homer, 5 Metc. 462; Cadwalader's App., 64 Pa. St. 293.

used the name of another person as the purchaser instead of his own is sufficient to invalidate the transaction in equity (*e*). Proof of undervalue is not necessary (*f*). In order that an agent, employed to sell, may purchase himself, he should disclose to his principal all the knowledge which he himself possesses (*g*).[1]

Agent not absolutely precluded from buying.]—In *Ex parte Lacey* (*h*), 1802, Lord Eldon laid down a rule which marks with sufficient exactness the limits of the doctrine that a trustee cannot buy from his *cestui que trust*. Properly stated, a trustee [★ 325] ★ cannot buy from himself. A trustee, who is entrusted to sell and manage for others, undertakes in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may, by a new contract, dismiss him from that character, but even then, that transaction by which they dismiss him must, according to the rules of the court, be watched with infinite and the most guarded jealousy. This case is also an authority for the principal that it is quite immaterial what value a trustee gives for the estate of his *cestui que trust*.[2]

Purchase of annuity bond.]—The House of Lords again confirmed the principal of the above cases in *Hamilton* v. *Wright* (*i*), 1842. In 1815, the appellant assigned all his property in trust for the benefit of his creditors. Wright became a trustee in 1818. Meantime the appellant had become surety for the Earl of Strathmore in a bond for the payment of an annuity during his life. T. advanced the money. In 1822, Wright obtained an assignment of the bond for a valuable consideration. The main question for decision was whether he as trustee had a right to purchase for his own benefit this annuity payable by the appellant. "The ordinary case," said Lord Brougham, "has been when the question arose upon a purchase of debts owing at the time of the trust being created. But the purchase of a debt subsequently incurred, if that be relied on as taking the present case out of the general rule, gives the trustee,

(*e*) Trevelyan *v.* Carter, 9 Beav. 140; Lewis *v.* Hillman, 3 H. L. Ca. 607.
(*f*) Murphy *v.* O'Shea, 2 J. & L. 420.
(*g*) Lowther *v.* Lowther, 13 Ves. 103.
(*h*) *Supra.*
(*i*) 9 Cl. & F. 111.

[1] Cox *v.* John, 32 Ohio St. 532; Leitch *v.* Wells, 48 Barb. (N. Y.) 637.

[2] Trustee may buy. Every purchase by a trustee from his *cestui que trust* is not illegal. If the *cestui que trust is sui juris* and the trustee can prove that there was such a *bonâ fide* contract as will support the purchase in a court of equity, and that everything connected therewith was perfectly fair, the transaction will be upheld.

It is a question for the jury whether such was the nature of the purchase. Graves *v.* Waterman, 63 N. Y. 657; Rice *v.* Cleghorn, 21 Ind. 80; Brown *v.* Cowell, 116 Mass. 465; Buel *v.* Buckingham, 16 Iowa, 284; Bryan *v.* Duncan, 11 Ga. 67.

whose duty it is to keep the residue as large as possible for the debtor, an interest in cutting it down, at least by the amount of his own debt; it also gives him an interest in keeping as large a fund as possible free from the operation of debts prior to his own, in order that his own may be more surely and speedily satisfied, and this is an interest directly in conflict with his duty under the trust to the prior creditors."

Agent for sale cannot buy off purchaser if sale incomplete.]—The rule that no agent in the course of his agency, and in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal is an inflexible rule (*j*). With respect to the question how far a trustee or ★ agent for [★ 326] sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell, there is a question closely connected upon which Lord Justice Mellish has made some apposite remarks in a recent case (*k*). "In my opinion," said his lordship, "as long as the contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it,—as long as it remains in that state he cannot repurchase the property from his own purchaser, except for the benefit of his principal. It seems to me that that necessarily follows from the established rule that he cannot purchase the property on his own account. There may, of course, be cases of agents for sale who, when they have once made the contract, have concluded their agency, such as the case of an auctioneer—when he has knocked the estate down and made the written contract, it may be said that his contract has terminated. I should suppose that even in that case the court would look with considerable suspicion on a repurchase by such an agent as an auctioneer from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been some previous concert and understanding between them."

SECT. 4.—*Fiduciary Relation of Directors.*

General principles.]—Directors are persons selected to manage the affairs of a company for the benefit not of themselves but of the shareholders. Their office is one of trust. If they undertake the office, their duty is to execute it fully and entirely. If that office requires all their time and attention, it is their duty to give them (*l*). Their fiduciary character is well established, nor can they by any subterfuge, however skillful and however coloured, take advantage of their position to the detriment of the shareholders. This prin-

(*j*) Per Lord Justice James, Parker *v.* McKenna, L. R., 10 Ch. 96; 31 L. T. Rep., N. S. 745.

(*k*) See *supra*, p. 325, n. (*k*).

(*l*) See per Sir J. Romilly, The York and North Midland Rail. Co. *v.* Hudson, 16 Beav. 485; Bennett's case, 4 De G. & M. 297.

ciple has been recognized by the legislature, which has provided that where it appears in the course of the winding up of a company that any officer of the company has been guilty of any misfeasance, or breach of trust in relation to the company, the court may examine into his conduct, and compel him to contribute such sums [★ 327] of money, by way ★ of compensation in respect of the misfeasance or breach of trust, as the court thinks just (*m*).

Their duties and liabilities—May be trustees or mandatories.]—One of the earliest reported cases decided under this head was *The Charitable Corporation* v. *Sutton* (*n*), decided by Lord Hardwicke in 1742. "I take the employment of a director to be of a mixed nature," said his lordship; "it partakes of the nature of a public office, as it arises from the charter of a crown, but it cannot be said to be an employment affecting the public government. . . . Therefore, committeemen are most probably agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance. Now, where acts are executed within their authority, in such cases, though attended with bad consequences, it will be very difficult to determine that these are breaches of trust. For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen; and, therefore, were guilty of a breach of trust. Next as to malfeasance and nonfeasance. For instance, in non-attendance; if some persons are guilty of gross negligence, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that he had no benefit from it, but that it was merely honorary." Lord Chelmsford has distinguished between directors who are trustees and directors who are simply agents or mandatories in *Overend, Gurney & Co.* v. *Gibb* (*o*). The above case of *Charitable Corporation* v. *Sutton* settled the principle that a corporation can sue its directors or other persons for a breach of duty towards it (*p*). Cases such as *The Joint Stock Discount Company* v. *Brown* (*q*), *The Land Credit Company* v. *Fermoy* (*r*), and *The Panama case* (*s*), were all instances of the misapplication of funds of the company, for breach of duty towards it after its formation, [★ 328] and not in its formation. See, ★ too, *Re Ambrose Lake Tin and Copper Mining Co.* (*t*), and *Re Gold Co.* (*u*); and distin-

(*m*) Companies Act, 1862, s. 165.
(*n*) 2 Atk. 400.
(*o*) L. R., 5 H. L. 480.
(*p*) See Phosphate Sewage Co. *v.* Hartmont, L. R., 5 Ch. Div. 394.
(*q*) L. R., 8 Eq. 381.
(*r*) *Ibid.*, 5 Ch. 763.
(*s*) L. R., 10 Ch. 515.
(*t*) 14 Ch. Div. 390.
(*u*) 11 Ch. Div. 701.

guish *Re British Seamless Paper Box Co.* (*v*), where the concurrence of members of a company freed the directors from liability.[1]

Extent of their liabilities of the shareholders.]—Directors, it is said, are, in a sense, trustees for the shareholders. Hence, where a director shares with a stranger the benefit of a bargain made between the stranger and the company the director's share belongs to the company. This is well established, and as sound upon authority as it is in principle (*x*). Hence, where articles of association empowered the directors to pay 10,000*l.* to the promoters of the company upon the first allotment of shares, and, the promoters having 5,000*l.* out of the first money subscribed, and having paid 500*l.* to each of four directors, the latter were ordered to refund to the company the money so received (*y*). Again, a power to decide whether at a particular time a call ought or ought not to be made, is a fiduciary power. If persons having to exercise a fiduciary power choose to place themselves in a position where their interests pull one way while their duty is plainly to do something quite different, and for that reason abstain from exercising that power, they must be held to all the same consequences as though that power has been exercised (*z*). And it may be stated generally that courts of equity are exceedingly reluctant to exonerate directors in any way from performing their duties; hence, since it is the duty of directors to be on the alert, they will not be exempted from lia-

(*v*) 17 Ch. Div. 497.
(*x*) *Re* Brighton Brewery Co., 37 L. J., Ch. 278.
(*y*) Madrid Bank *v.* Pelly, L. R., 7 Eq. 442.
(*z*) Per Sir G. M. Giffard, L. J., Gilbert's case, L. R., 5 Ch. 559.

[1] A board of bank directors may delegate to a committee of its members, power to mortgage real estate. This committee has impliedly the power to execute all instruments necessary for that purpose and to affix the corporate seal thereto. Burrill *v.* Italian Bank, 2 Metc. (Mass.) 163. If the corporation becomes insolvent, while under the management of the directors they are to be considered as trustees of the assets for the benefit of creditors. If they, themselves, are creditors they cannot secure any advantage or preference over the other creditors.

As where the assets of an insolvent corporation were transferred, by vote of the directors, to a partnership, of which one of the directors was a member, as security for a debt due to the partnership.

As soon as the corporation went into bankruptcy the assignees were entitled to recover the assets so transferred to the prejudice of other creditors, by filing a bill in equity for that purpose. Bradley *v.* Farwell, 1 Holmes, 433.

The president of a corporation is a trustee, and as such, cannot buy up any claim against the corporation and then sue on it. Brewster *v.* Stratman, 4 Mo. Ap. 41. The directors of a corporation, even with the consent of the stockholders, cannot authorize a discontinuance of the corporation and a distribution of its capital stock among the stockholders; provided such authority is not given them by a legislative act or by a decree of a court of chancery. Ward *v.* The Sea Insurance Co., 7 Paige (N. Y.), 294.

Where the directors of a corporation do any act which works the forfeiture of the charter, it is such a violation of the law incorporating the company, as to enable a stockholder or creditor to institute proceedings against such corporation and have a receiver appointed for the purpose of winding up its affairs, *id.*

bility for the consequences of not attending to the business of the company simply on the ground that they slept on their duty (*a*). On the other hand, directors are not liable for the consequences of unwise, absurd, or ridiculous conduct, where the conduct is entirely due to a mere default of judgment. Thus it is said if a director upon his appointment finds a state of things which had existed for some time with the assent of all parties, it could hardly be said that he was in the position of a trustee who, finding the trust fund lost, does not take steps to recover it (*b*). Again, whatever may be the [★ 329] case with a trustee, ★ a director cannot be held liable for being defrauded (*c*). Nor because a man is a director is he necessarily a trustee of the shares which he holds for the general body of shareholders (*d*).[1]

(*a*) See Land and Credit Company of Ireland *v.* Fermoy, L. R., 5 Ch. 770, per Lord Hatherley.

(*b*) See Turquand *v.* Marshall, L. R., 4 Ch. 376.

(*c*) Per Lord Hatherley, in Land Credit Company of Ireland *v.* Fermoy, *supra*, p. 772.

(*d*) Per Sir G. M. Giffard, *supra*.

[1] The directors of a bank are individually liable to the creditors, if they allow the stockholders to withdraw its funds to the amount of their subscriptions, without adequate security, and invest the same in their private business. Bank of St. Mary's *v.* St. John, 25 Ala. 566.

If a violation of the charter of a corporation results from a mistake on the part of the directors as to their powers, and such mistake did not proceed from a want of ordinary care and diligence, the directors will not be personally liable. Hodges *v.* New England Screw Co., 1 R. I. 312.

The relation of a director to the corporation, is that of a trustee. Where one who is a director, and also secretary of the board, presents a bill for extra compensation as such secretary, he is disqualified to act as director upon the auditing of such bill. If he does so act, any stockholder may bring suit to prevent the treasurer of the company from paying such bill. Butts *v.* Wood, 37 N. Y. 317.

He is also incapacitated from dealing in his own behalf, with the corporation property or in respect to any matter involving his powers and duties as director. He cannot, therefore, purchase the property of the company upon a sale under an execution against it. In such case it is not necessary to prove fraud or advantage. Hoyle *v.* Pittsburgh & Montreal R. R., 54 N. Y. 314.

If, however, the director is also an execution creditor, he has the right to sell under his execution. But whether under such sale he can purchase to protect his own right and hold absolute against the company: *quere*, *id.* An express contract between a corporation and its directors is not void but voidable at the option of the *cestui que trust*. As to third persons it is valid and can be enforced. Stewart *v.* Lehigh Valley R. R., 38 N. J. Law, 505.

The duties and obligations imposed upon the directors of a corporation are the same as those imposed by the law upon trustees and other agents. They cannot, therefore, with respect to the same matters, act for the corporation and for themselves, nor can they occupy a position in conflict with its interests. Wardell *v.* Railroad Co., 103 U. S. 651.

Directors of a corporation are individually liable for injuries resulting from any fraud or malfeasance on their part, or for any gross negligence which amounts to a breach of trust. And the proof of such fraud or gross negligence is on the party alleging it.

There must be affirmative proof, and mere constructive fraud will not be sufficient. The directors are not liable, however, either to the stockholders or

Secret profits made by directors in the conduct of negotations.]—Directors will not, any more than other agents, be allowed to make a secret profit out of their office, or in transactions with the company. *Hay's case* (*e*) is not only one of the most recent, but also one of the best illustrations of this principle. Sir John Hay was invited by the agent of the promoter of a company for the purpose certain oil springs to become a director of the projected company. The property was to be purchased from the promoters. It was understood and agreed that the necessary qualification of forty 25*l.* shares would be provided for Sir John, who thereupon signed the memorandum of association for forty shares. These shares were to be provided out of certain fully paid-up shares which the vendor was to receive in part payment of the purchase-money. Some time afterwards it was doubted whether this transfer by the vendor of the property would be a discharge under the memorandum of association. To set the matter right, when the vendor's agent received the balance of the purchase-money he gave to Sir John a cheque for the value of the forty shares, and the latter himself paid for the shares. Vice-Chancellor Malins decided that his liability to pay for the shares continued; the Court of Appeal upheld the decision. In speaking of the above rule, Lord Justice Mellish made some important observations: "There is no doubt at all, and it is perfectly settled law," said his lordship, "that that rule applies with peculiar stringency to the directors of all joint stock companies, who are the agents for the company in carrying out the sales or purchases made by the company; and the only question that we have to decide in this case is, whether that principle applies to it, and whether Sir John Hay has made a profit out of his agency without the knowledge of his principals." Then follows the equally important rule that there is no difference between a profit made by an agent after he has become an agent, and a profit made by an agent at the time he becomes an agent by means of a bargain made not with his principal, but with a person who is proposing to enter into a ★ contract with his principal; "that is to say, if, [★ 330] while negotiations are in course, and before any contract is concluded between the vendor and the purchaser, the vendor says to some particular person: 'If you will become the agent of the purchaser, and if you succeed, on becoming the agent of the promised purchaser, in carrying out the contract with me, then I will make

(*e*) 33 L. T. Rep., N. S. 466; L. R. 10 Ch. 593.
(*f*) L. R., 10 Ch. 96.

the corporation for damages resulting from unwise or indiscreet management, if their conduct is entirely due to a mere mistake of judgment. Booth *v.* Robinson, 55 Md. 419.

It is the duty of the corporation to call the directors to an account for any breach of trust or other misconduct, and to enable a stockholder to proceed against the directors, he must allege in his bill, not only the breach of trust, &c., but also the fact that the corporation has failed or refused to take the proper legal steps to redress the wrong, *id.*

you a payment out of the purchase-money which shall ultimately be paid." This puts the case very clearly, and leaves no doubt of the applicability of the principle under discussion. Lord Justice James was quite as emphatic in support of the principle. "That," he said, "was a principle repeated by me, and repeated most emphatically by the full court, in the case of *Parker* v. *McKenna* (*f*); and I again desire to repeat that this court will never sanction anything of that kind, and will make the persons who engage in schemes such as this that has been brought before us pay back to the uttermost farthing what they have received." If any further decision were necessary, this alone would suffice to show that directors will not, any more than other agents, be allowed to take advantage, with impunity, of the confidence reposed in them.[1]

The rule applies to secretary of company—Measure of damages.] —The principle adopted in *Hay's case* (*g*), namely, that all the remuneration which the agent of a purchaser receives secretly from the vendor is received for the benefit of the purchaser, was acted upon in 1875 by the Court of Appeal in *McKay's case* (*h*). In that case the owner of a mine agreed with M., who was acting on behalf a company, to sell the mine to the company for an amount made up of cash and paid-up shares. By another secret agreement the owner was to give M. 600 paid-up shares for his trouble. The company was formed, and whilst M. was secretary to the company the shares were allotted to the vendor, who transferred the 600 shares to M., in whose name there were 500 when the company was ordered to be wound up. The court held, first, that M. had been guilty of misfeasance towards the company, and could, under sect. 165 of the Companies Act, 1862, be made to contribute in respect of such misfeasance; secondly, that the measure of damages to be contributed by M. was the highest value of the shares trans- [★ 331] ferred to him, and that, as some of the ★ shares had been allotted to solvent shareholders, the value must be taken to be the amount unpaid on the shares.

In *Pearson's case* (*i*) a director of a company received from one of the promoters a number of paid-up shares sufficient to qualify him as a director, and then took an active part in carrying out a conditional contract for the purchase by the company of a colliery belonging to the promoters, and for purchasing and working which the company was formed. The Court of Appeal (affirming the decision of Vice-Chancellor Bacon) held that the director was liable,

(*g*) L. R., 10 Ch. 593.
(*h*) L. R., 2 Ch. Div. 1.
(*i*) L. R., 5 Ch. Div. 336.

[1] The directors of a ferry company purchased a boat in their individual capacity and then sold it to the company of which they were directors making thereby quite a profit. It was held that such transaction was fraudulent and that all the profits made by the directors inured to the benefit of the company. The company were also entitled to interest on such profits. Parker *v.* Nickerson, 112 Mass. 195.

under the 165th section of the Companies Act, 1862, to pay to the liquidator the value of the shares; and that in the present case the shares were to be taken as having been worth their nominal amount.

Summary of principles.]—The following principles may be gathered from the judgment of the Court of Appeals:—

(1.) A director in the above position, who has received a present of a part of the purchase-money, and being knowingly in the position of agent and trustee for the purchasers, can not retain that present as against the actual purchasers.

(2.) Whether such a purchase is or is not an advantageous one for the company,—whether the property is or is not worth the increased price paid for it by the company,—is wholly immaterial.

(3.) A director in such a case will be deemed to have obtained the present under circumstances which made him liable at the option of the *cestuis que trust* to account either for the value at the time he received the present, or to account for the thing itself and its proceeds if it has increased in value.

Agreements by directors to take paid-up shares as qualification.]—An important distinction has been drawn by the Court of Appeal in *Carling, Hespeler, and Walsh's cases* (*k*), under circumstances which may well claim attention. On the 23rd December, 1871, the Western of Canada Oil, &c. Company (Limited) was registered under the Companies Acts for the purpose of carrying on a trade in oil. The capital was to consist of 4,500 shares of 100*l.* each. The agreement to purchase the oil works necessary for carrying on the trade was made ★ on behalf of the company on the [★ 332] 18th December. They were to be sold for 400,000*l.*, of which 150,000*l.* was to be paid in cash, and the remaining 250,000*l.* by the allotment to the vendors or their nominees of 2,500 fully paid-up shares in the company. The minimum qualification of a director was the holding of five shares. No shares were allotted in 1871, but money was raised by the issue of debentures. Early in 1872, the vendor of the oil works arranged with Messrs. Carling, Hespeler, and Walsh that he would transfer to them a sufficient number of shares to qualify them as the Canadian directors, on condition that they would act in that capacity. The offer was accepted, and the directors in England, upon receiving instructions from the vendor, allotted to the new directors thirty shares a-piece as fully paid up out of the vendor's fully paid-up shares. The company was unsuccessful, and in 1873 ordered to be wound up. An application was made on behalf of the official liquidator to place Messrs. Carling, Hespeler, and Walsh on the list of contributories in respect of thirty shares each. The Master of the Rolls was of opinion that the company were entitled to say that the purchase-money of the property had been increased by the amount of the shares so allotted, and

(*k*) L. R., 1 Ch. Div. 115.

consequently that the shares should be treated as not having been paid for at all. The Canadian directors appealed, and this decision was reversed by the court above simply on the ground that the shares could not be treated as unpaid shares. It is apparant from the remarks of the several judges who constituted the Court of Appeal, viz. Lords Justices James and Mellish, Baron Bramwell, and Mr. Justice Brett, that the Court regretted the impossibility of sustaining the judgment of the Master of the Rolls. All were agreed that the appellants never made themselves liable for any shares at all, that their contract was to take fully paid-up shares, and that although the appellants might be held to be trustees of the company for paid-up shares, they could not be considered as holders of unpaid shares. The learned judges were equally agreed in considering that a breach of trust had been committed by the appellants. The chief question is, then, what remedy is provided? Lord Justice Mellish answered this question. The company might adopt any one of three courses:—(1) They might cancel the allotment to these directors. (2.) If the shares were sold the company might call upon them to account for the profits. (3.) If no profit had [★ 333] made on the ★ sale the company could compel the directors to give to the company an indemnity for the loss incurred by reason of their misfeasance in depriving the company of the power of allotting the shares to other persons. In other words, the directors could only be made to pay to the company in respect of a breach of trust. Should the case again come before a court of the Chancery Division, it may be disputed whether the breach of trust was confined to the five shares or extended to the thirty. Lord Justice Mellish was of opinion that more facts, as well as a much more careful examination into the state of things between the company and the vendor, would be necessary for the decision of the question when it arose. No doubt the considerations here mentioned are more often material in proof of the existence of a fiduciary relation than for the discovery of the extent of such a relation. It is not to be supposed that these remarks of the Lord Justice have any tendency to recognize the qualification shares as the limit of a director's fiduciary relation. Upon a survey of the whole case it is impossible to question the substantial justice of the decision of the Court of Appeal. The shares could not, without a violent perversion of language, be called unpaid-up shares; yet there had none the less been a breach of trust, and for that breach of trust a liability to indemnify the company was incurred.

Extent to which directors are in fiduciary position.]—The true limits of the doctrine that directors are agents in a fiduciary position may be expressed in the following way: Directors, in contemplation of the law, are trustees of the powers vested in them; but their liability towards the shareholders is not co-extensive with that of trustees to their *cestui que trust*. They are not liable for results

wholly due to default of judgment, such default not being itself due to *crassa negligentia* (*l*).

Secondly, as to promoters.

Agents employed to form a company not necessarily promoters.]—Agents employed by vendors to form a company are not liable as promoters of such company merely because they bargain with the vendors to be paid a commission out of the purchase money, which payment was not made known to the company, and also to have the conduct of the sale of the ★ company's ores. The ques- [★ 334] tion was raised in *Lyndley and Wigpool Iron Ore Co.* v. *Bird* (*m*), in 1885, before Pearson, J. The action was to recover a sum of 10,800*l.*, which it was alleged, unsuccessfully, the defendant had received as trustee for the company from the vendors. His lordship came to the conclusion, first, that the purchase money of the property sold to the plaintiffs had not been increased to pay promotion money (*n*). Secondly, that an agent for vendors may take upon himself the drafting, settling, printing, and publishing of the prospectus of the intended company, and see that the memorandum and articles of association were properly drawn, without becoming a promoter. Thirdly, that the agent's guarantee to place the stock and to sell the company's ores on commission did not affect his position. Lastly, that the circumstances mentioned were not sufficient to take the case out of the ordinary rule—that a vendor to a company may pay his agent whatever he pleases, provided the money comes out of his own pocket, and not out of the coffers of the company.

Sale to company by promoters.]—When it is once established that promoters are in a fiduciary position, they cannot become vendors to the company unless they make a full disclosure. So if A. purchases a horse in the name of B. for 100 guineas, and invites someone else to join him in a purchase from B., without disclosure of the fact that A. is really the vendor, the latter sale cannot stand (*o*).[1]

Principles relating to the contracts of promoters and members of syndicates.]—In *New Sombrero Phosphate Company* v. *Erlanger* (*p*), which was decided in 1877, the action was brought by a limited liability company against certain persons who were the promoters of that company, and who were the vendors to the company

(*l*) Overend, Gurney & Co. *v.* Gibb, L. R., 5 H. L. 480; Turquand *v.* Marshall, L. R., 4 Ch. 376.

(*m*) 31 Ch. Div. 328.

(*n*) See Arkwright *v.* Newbold, 17 Ch. Div. 301, which was an action in deceit.

(*o*) See *per* Lord Justice James, New Sombrero Phosphate Co. *v.* Erlanger, 46 L. J., Ch. 425, and L. R., 5 Ch. Div. 73.

(*p*) *Supra.*

[1] A. and B. organized a company in order that A. might sell his lands to such company and B. build a railroad for them. Held, that A. was not entitled to make any profits out of the land in selling to the company. Rice's Appeal, 79 Pa. St. 168.

of a mineral working. The property in question was bought in the name of an agent for 55,000*l.* from an official syndicate formed for the purpose. A few days afterwards a new company was registered by the syndicate, and a provisional contract bearing even date with the articles was executed for the sale of the property to a trustee for the company so formed for 110,000*l.* Of the five directors [★ 335] named in the articles, and ★ of whom two formed a quorum, one never acted, and another was abroad at the time of the incorporation. Of the three directors who remained one was the nominal vendee, and another appeared to be the mere nominee of the vendors. Nine months after the the formation of the company a committee of investigation was appointed, and a bill was filed six months afterwards by the company for the purpose of setting aside the sale to the company. The defences raised were, that the contract was fairly obtained; that whether it was unfairly obtained or not, the company had by its laches or acquiescence precluded itself from suing; and thirdly, that whether or not the company had so precluded itself, the transaction was not one which in law could be ripped up or set aside by the company, but that only damages could be claimed in an action by individual shareholders against those persons who made the misrepresentation to them to induce them to accept the shares. The Court of appeal ordered the contract to be set aside. The following propositions may be gathered from the opinions delivered by the learned Lord Justices:—

(1.) A promoter is in a fiduciary relation to the company which he causes to come into existence. If he has a property which he desires to sell to the company, it is quite open to him to do so, but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward, or other agent.

(2.) It is not merely a technical rule which requires that a vendor in any respect in a fiduciary position should tell the exact truth as to his interest (*q*).

(3.) A contract entered into by one agent of the promoters of a company to sell with another agent of the promoter to buy, is a mere pretence or sham contract (*r*).

(4.) The company being the body with whom, by its agents, the contract is entered into, must be the body to set it aside, and although individual shareholders who were parties to [★ 336] the fraud may be benefited, yet it is not the ★ doctrine of courts of equity to hold its hand and avoid doing justice because it cannot apportion the punishment (*r*).

(5.) All members of a syndicate, under circumstances such as are above stated, are liable jointly and severally (*r*).

(*q*) Per James, L. J.
(*r*) Per Jessel, M. R.

Prospectus of company—What information must be disclosed.]—The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38, provides that ever prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. In *Gover's case* (*t*), Lord Justice James and Baron Bramwell agreed that the 38th section required only those contracts to be specified in the prospectus which were entered into by the company, or by a person who, at the time of entering into the contract, was a promoter, director or trustee. Lord Justice Mellish, on the other hand, thought that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter, director or trustee, provided the company has become entitled to the benefit, or liable to the provisions, of the contract before the prospectus is issued. Lord Justice Brett, too thought that it was immaterial whether the contract was made before such person became promoter, trustee or director. The three former agreed, however, in the opinion that where a prospectus omits to specify a contract, which under the 38th section ought to be specified, the remedy of the person taking shares on the faith of the prospectus is by action personally against the promoter, director or trustee who issued the prospectus. But under such circumstances the section gives no right to the shareholder as against the company to have his name removed from the register.[1]

(*t*) L. R., 1 Ch. D. 182; 45 L. J., Ch. 83.

[1] "Those who issue a prospectus holding out to the public the great advantage will accrue to persons who will enter into a propesed undertaking and inviting them to take shares upon the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy and to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature. or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares.

If it can be shown that a material representation, which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder and the latter comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it." Bispham's Equity § 208.

Fraudulent representations of a railroad company, through its officers or agents, as to its pecuniary condition, are sufficient to set aside a contract for the sale of land obtained thereby. McClellan *v.* Scott, 24 Wis. 81. See also Paddock *v.* Fletcher, 42 Vt. 389.

[★337] ★ *Fraud by promoters and their cestuis que trust.*]—Promoters, like trustees, who lend themselves to a fraud by their *cestuis que trust*, and receive money thereby from the defrauded party, cannot escape from the liability which attaches alike to them and to their *cestuis que trust*. That liability is a joint and separate liability of all the accomplices. In *Phosphate Sewage Co.* v. *Hartmont* (*u*), certain persons who were owners of a concession from a foreign government combined together to form a company to purchase the concession, knowing at the time that through their default it was voidable and liable to forfeiture. The owners and others who were promoters of the company fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended company, who were to be paid a portion of the purchase-money for their share in the transaction. The solicitors for the vendors, who were also the solicitors for the company, concealed the invalidity of the title, and the trustees neglected to require evidence to establish the title. A bill was subsequently filed by the company against the owners of the concession, the promoters, the trustees, the directors and the solicitors; and the Court of Appeal, affirming the decision of Malins, V.-C., held that the owners and promoters must repay the whole purchase-money; that the trustees, who receive money in the nature of a bribe for neglecting their duty, must repay what they had so received: and that all the defendants, including the solicitors, must pay the costs of the suit.

Sect. 5.—*The Fiduciary Position of Legal Advisers.*

(a.) *In Matters of Contract.*

Three aspects of the fiduciary relation.]—The general rule of law equally applicable to all trustees and persons in a fiduciary position is that no person in such a position may take advantage of the confidence reposed in him. The sound policy upon which the rule is based is nowhere more apparent than in transactions between parties standing in the relations of solicitor and client or counsel and client. Whatever may be urged in defence of the rule in other [★338] cases may here be urged with even greater effect, ★ for the relation is one of great confidence, giving to the adviser more than ordinary influence over the client. Hence it is that the law is exceedingly suspicious of all transactions between the parties. The rule which thus subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary trans-

(*u*) L. R., 5 Ch. Div. 394.

The shareholder to have the contract set aside must get his shares direct from the company. If he buys in the market he might not be able to get redress. See New York and New Haven R. R. *v.* Schuyler, 34 N. Y. 30; and Buffalo *v.* Mali, 36 N. Y. 200.

actions is not an isolated rule, but a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand (*x*). In treating the question now before us we shall find that the fiduciary position of legal advisers may be considered from three aspects. It may be considered in its consequences:

(1.) In matters of contract;

(2.) Where the client makes a gift;

(3.) In the matter of giving professional service.

Sale of annuity to client set aside.]—The rules upon the first head were laid down by Lord Eldon, in *Gibson* v. *Jeyes* (*y*), decided in 1801, in which case the sale of an annuity by an attorney to his client was set aside. Legal advisers may contract with their clients provided the relation is dissolved—provided the duties attaching to their position are satisfied. "I do not mean to contradict the cases of trustees buying from their *cestuis que trust*," said the Lord Chancellor, "but the relation between the parties must be changed; that is, the confidence in the party, the trustee or attorney, must be withdrawn. That is the principal of the cases of a trustee buying for himself. . . . An attorney is not incapable of contracting with his client; a trustee also may deal with his *cestui que trust*, but the relation must be in some way dissolved, or if not the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor." The application of this principle to the present case is very instructive. Obviously there was nothing to prevent the attorney dealing with his client, but, as Lord Eldon pointed out, when the client asked him to deal he should not contract with her, though she insisted—the relation still subsisting—unless she obtained the advice of another attorney. The same learned lord gave the same rule in other words: "An attorney buying from his client can never support it unless he can prove that his diligence to do ★ the best for the vendor has been as great [★ 339] as if he was only an attorney dealing for that vendor with a stranger. That must be the rule." The proof of actual fraud or incapacity on the part of the attorney, is not necessary in order to set aside the contract (*z*). Again, in a case which came before him in 1803 (*a*), he says, "The principle is that as the trustee is bound by his duty to acquire all the knowledge possible, to enable him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the *cestui que trust*, which he always obtains at the expense of the *cestui que trust*, no court can discuss with competent sufficiency or safety to the parties." The purchase may

(*x*) Per Wigram, V.-C., in Edwards *v.* Meyrick, 2 Hare. 69.
(*y*) 6 Ves. 266.
(*z*) 6 Ves. 270.
(*a*) *Ex parte* James, 8 Ves. 343.

be made at an auction, but that circumstance, though evidence of fairness, makes no difference in the principle (*b*).[1]

Purchase of client's real estate, "attorney in hâc re *explained.*]—An instructive case was decided in 1854 by Lord Chancellor Cranworth and Lord Justice Turner, on appeal from a decree of Vice-Chancellor Stuart (*c*), setting aside, at the suit of the heir-at-law of the vendor, two purchases of real estate by the defendant. The defendant, an attorney, was engaged in the sale of his client's property by auction; only one of the lots was then sold. In 1848 the first sale to the defendant took place, the second in 1850. The consideration for the first purchase was stated to be 600*l.*, that for the second 208*l.* Only 260*l.* was paid the residue being made up by two annuities, one for 40*l.*, the other for 26*l.*, for the vendor's life. These annuities fairly represented an equivalent for the residue of the consideration according to the value of such an annuity on the average life of a person of the vendor's age, according to the government annuity tables. But the vendor's life was not a good average life, and this fact was either known to the defendant or easily within his knowledge. As a matter of fact the vendor died in about a third of the time for which the annuities had been calculated. The Lord Chancellor raised two questions for solution: Did the relation of attorney and client subsist at the time of the transaction? Was there any neglect of duty on the part of the de-
[★340] fendant. His lordship answered both questions ★ in the

(*b*) *Ibid.* 348.
(*c*) Holman *v.* Loynes, 23 L. J., Ch. 529.

[1] Before the termination of the suit an attorney cannot contract with his client for a part of the demand or subject matter of the litigation, as a compensation for his services. Merritt *v.* Lambert, 10 Paige, 352.

An attorney who buys an outstanding title or one adverse to that of his client does so for the client, if the client so elect; and this even though the attorney act in good faith and did not intend to deceive. This rule of law is founded on public policy and not on fraud. Smith *v.* Brotherline, 62 P. St. 461; Trotter *v.* Smith, 59 Ill. 240; Downing *v.* Major. 2 Dana (Kan.), 228; Payne *v.* Avery, 21 Mich. 524; Mills *v.* Mills, 26 Conn. 213.

An attorney can never buy an outstanding title whether it is before or after the cause is ended, during the continuance or after the termination of his employment, or whether before or after the client has disposed of his interest. If such were permitted no one would be safe in the employment of professional aid. Henry *v.* Raiman, 25 Pa. St. 359.

The general rule as to contracts between attorney and client applies even after the relation has been terminated if his influence over the client still exists. Mason *v.* Ring, 3 Abb. Ct. App. 210.

A deed given in such a case as a compensation for services will be allowed to stand as security for what is actually due, *id.* An attorney may enter into a contract with his client. Yeamens *v.* James, 27 Ark. 195. In all such transactions when beneficial to the attorney, the presumption is in favor of the client, that they were not fair, so it is essential for the attorney to show that the client was fully informed of his rights and interests in the subject matter of the transaction and the nature and effect of the transaction itself, and that he was so placed as to be able to deal with the attorney at arm's length. Kisling *v.* Shaw, 33 Cal. 425.

affirmative. There was a manifest neglect of duty on the part of the defendant in not endeavoring to get a higher annuity for the vendor. This he could have done by reason of the vendor's intemperate habits. Lord Justice Turner entered very elaborately into an examination of the meaning and application of the phrase "attorney *in hâc re*." After a summary of the authorities upon the point the judgment of Lord Eldon in *Montesquieu* v. *Sandys* (*d*), of Sir James Wigram in *Edwards* v. *Meyrick* (*e*), and of Lord Abinger in *Jones* v. *Thomas* (*f*), the conclusion drawn by his lordship was that the cases in which it had been hitherto held that an attorney might deal with his client as a stranger might do, were not cases in which the attorney had been concerned in any previous attempted sale, or in which any confidence as to sale had been reposed in him as attorney; or cases in which the attorney had acquired, or had had the means of acquiring, any peculiar knowledge as to the property, the subject of the sale to him. "The result of them, stated favourably to the defendant, and without reference to the important observations upon the subject of influence made by Sir James Wigram in *Edwards* v. *Meyrick*, cannot be put higher than—that an attorney may deal with a client as a stranger, where the circumstances are not such as to put him under the duty of advising the client." The sales were set aside. It will be observed that the rule prohibiting a trustee for sale from purchasing himself is more stringent than that regulating the contract of the attorney with his client. The former must divest himself of the character of trustee (*g*).[1]

Various applications of the principles.]—The above principles have been applied in a variety of cases. Thus, where a bankrupt's estate was purchased by the solicitor to the commission, the sale was set aside, and Lord Eldon refused to allow him to bid upon the resale, without the consent of the persons interested, after full information given, though the relation of solicitor and client were at an end (*h*). So where the petitioner to the fiat prayed for leave to bid at the sale of part of a bankrupt's property, without showing any peculiar circumstances, *e. g.*, that the solicitor was mortgagee, the court refused leave, though the assignees did not oppose the prayer (*i*). On the ★ same ground, where a solicitor, [★ 341] the party to a suit, had the conduct of a sale decreed by the court,

(*d*) 18 Ves. 313.
(*e*) 2 Hare, 60.
(*f*) 2 Y. & C. 498.
(*g*) See *per* Lord Eldon in Cane *v.* Allen, 2 Dow, 299.
(*h*) *Ex parte* James, 8 Ves. 337.
(*i*) *Ex parte* Town, 2 M. & Ayr. 29.

[1] He cannot purchase adverse title, if he does, he is to be considered as trustee for his client. Moore *v.* Bracken, 27 Ill. 23; Wheeler *v.* Willard, 44 Vt. 640; Zeigler *v.* Hughes, 55 Ill. 288; Baker *v.* Humphrey, 101 U. S. 494; Harper *v.* Perry, 28 Iowa, 57; Hatch *v.* Fogarty, 40 How. Pr. (N. Y.) 492; Davis *v.* Smith, 43 Vt. 269.

and purchased at the sale under a feigned name, the sale was set aside, though confirmed by an order, and the estate was again offered for sale at the price given by the defendant. If there was no higher bidder the defendant was to be held to his purchase (*k*). So, too, the purchase of a client's equity of redemption by solicitors was set aside, although another solicitor had been called in, and although the defendants had ceased to act as solicitors just before the contract (*l*). In this case, however, the solicitor called in had not performed his duty, and the defendants were aware of the fact. So a purchase by a solicitor from his client may be set aside, though the purchase is confirmed by the client's will. "I do not impute fraud or the exercise of undue influence to B.," said the Master of the Rolls, "in this transaction; but I rest my decision on the ground that he has incautiously involved himself in a transaction which throws on him the burthen of proving the correctness of it, which he has failed in doing" (*m*). Upon the same principles, the House of Lords decided that where a solicitor purchased the property of his client at a public sale, he was a trustee for the client, unless he could prove that he was neither an agent nor retained the relation (*n*). In the same case, it was also held that an inquiry into the value of the client's interest was immaterial, and that the plaintiff's right to relief was not barred merely by the lapse of ten years from the purchase.[1]

Company's solicitor and secretary.]—The secretary and solicitor of a company is in a fiduciary position towards the company, and therefore is not entitled in a winding-up to retain any commission for shares allotted to a client of his, even where it had been advertised that anyone introducing a client as a shareholder would be allowed a commission on the shares allotted, and though the secretary and solicitor of the company had expressly stipulated for the advertised commission, and it had been resolved at a board meeting that this commission should be paid to him, the real but undisclosed client being the chairman of the company (*o*).

[★342] ★ (b) *Where the Client makes a Gift to his Adviser.*

Gifts in excess of professional demand.]—The principle established by the House of Lords in *Middleton* v. *Welles* (*p*), decided in 1785, is substantially that which prevails at the present day. No gift or gratuity to a legal adviser, beyond his fair professional demand, made during the time that he continues to conduct or

(*k*) Sidney *v.* Ranger, 12 Sim. 118.
(*l*) Gibbs *v.* Daniel, 4 Giff. 1.
(*m*) Waters *v.* Thorn, 22 Beav. 547.
(*n*) Austin *v.* Chambers, 6 Cl. & F. 1.
(*o*) Barrow's case, 49 L. J., Ch. 253; 42 L. T. 12.
(*p*) 1 Cox, 112; 4 Bro. P. C. 245.

[1] See *ante* 339, note 1. 340, note 1.

manage the affairs of the donor, will, as a rule, be permitted to stand, more especially if such gift or gratuity arises immediately out of the subject then under the adviser's conduct or management, and the donor is at the time ignorant of the nature and value of the property so given. The reported cases in which this principle is either adopted or referred to extend as far back at least as 1735 (*q*).[1]

Lord Brougham's statement of the law.]—In *Hunter* v. *Atkins* (*r*), decided in 1834, a bill was filed to set aside a deed by which Admiral Hunter, when upwards of ninety years of age, gave a gift to the defendant, subject to a power of appointment by the donor. The facts of the case will not assist us, the defendant being a banker, but the judgment of Lord Brougham, C, is worthy of careful perusal:—"I take the rule to be this," said his lordship; "there are certain relations known to the law as attorney, guardian, trustee; if a person standing in those relations to a client, ward or *cestui que trust* takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule, rightly considered, is that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire ★ to benefit [★ 343] him by a gift, or, without such an intention being the predominating motive, he may wish to give him an advantage of a sale or a lease. No law that is tolerable among civilized men, who have the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to

(*q*) Proof v. Hines, Ca. in Eq., Talbot, c. 115.
(*r*) 3 M. & K. 113.

[1] Where there is a provision in a voluntary deed in favor of the counsel who drew, or advised it, for his services to be performed as a trustee under it, with the further provision that the said trustee may resign the trust to the other trustees without forfeiting the compensation, such provision is void unless it be proved that the grantor knew of it and without influence from those interested, assented to it; Greenfield Estate, 14 Pa. St. 490. A client may make a gift to counsel by will, even though the will be drawn by counsel, provided it was not drawn under any mistake or misapprehension caused by the solicitor; Bispham's Equity, § 231.

exercise any influence hurtful to others and advantageous to himself." The same learned lord summed up the authorities (*s*), and stated as their effect that inasmuch as a solicitor stands in the relation in which he does stand to his client, the proof lies upon him (whereas in the case of a stranger it would lie on those who opposed him) (*t*), to show that he has placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing had happened which might not have happened had no such connection subsisted (*u*).

Counsel and client—Conveyance for services as counsel.]—The above principles are no less applicable to the relation of counsel and client. *Brown* v. *Kennedy* (*x*), 1864, was a suit instituted by a husband and wife to set aside a deed executed by the wife before this her second marriage, in favour of the defendant who had acted as her counsel. There is no difficulty abouts the facts of the case. Mrs. S., who was involved in litigation of an intricate character, consulted the defendant on the subject in 1856. Being impressed with his views, she requested her solicitor to retain him as counsel. This was done, and the defendant refused to take any fees. He brought the litigation to a successful close by his exertions and ability, and the title of Mrs. S. to the matter in dispute was finally established in March, 1859. In the following May the deed in question was executed, conveying to the defendant the reversion of an estate. The consideration mentioned in the deed was services as counsel, esteem and friendship. In 1861 Mrs. S. married B. The legality of the deed was argued before Sir J. Romilly, M. R. In support of the deed it was urged (1) that the deed was well [★ 344] ★ understood by the plaintiff, and obtained by no undue influence; (2) that it was founded on a contract in which the plaintiff agreed to give him 20,000*l.* for his services; and (3) that it was only a due and just return and remuneration for the services he had rendered her. Upon the first point the Master of the Rolls decided that there had been undue influence. From the defendant's answer, it appears that he asked the plaintiff if she considered herself indebted to him in the 20,000*l.*, which she had so often referred to. She replied, "Certainly." He then wished for some security, and she told him that she had left him by will the whole estate charged with 10,000*l.* The defendant told her that a will was no security, and suggested that she should convey to him by deed what she meant to give by will. She agreed, and wished the deed to be a deed of gift, reserving to herself a power of sale conditioned upon her giving the defendant the money. The defend-

(*s*) Gibson *v.* Jeyes, *supra;* Wright *v.* Proud, 13 Ves. 40; Hatch *v.* Hatch, 9 Ves. 296; Harris *v.* Tremenheere, 15 Ves. 34.

(*t*) Villiers *v.* Beaumont, 1 Vern. 100; Toker *v.* Toker, 31 Beav. 629.

(*u*) Hunter *v.* Atkins, 3 M. & K. 136.

(*x*) 33 Beav. 133; affirmed, 4 De G., J. & S. 217.

ant next day drew a draft of the proposed deed, and left it with her. Some alterations were made, but she would not ask her own solicitor to attest the deed, though the defendant wished it. The deed, however, was fully explained to her by a solicitor named by herself. "But this is not sufficient to support the transaction," said his Honour. "A father may obtain from his child the grant of her whole estate, the child may perfectly understand what she is about, but this will not enable the father to hold the property, and turn his son or his daughter penniless on the world. The influence so possessed, and however acquired, must not be exercised for the benefit of the person possessing it." But more than this, no one had explained to the plaintiff the full effect of the deed. No one had considered that she could not during her life, supposing the deed to be valid, enjoy the estate as she had hitherto done, with the same power of granting leases, cutting trees, opening mines and quarries, pulling down cottages, and the like. The defendant, during the progress of the case, suggested that the deed might be reformed for the purpose, but permission was refused, because, as pointed out by the learned judge, the court cannot compel the grantor to alter the grant; and if the grantor contests it, the deed must stand or fall in its actual condition without alterations. The second contention was disposed of by *Kennedy* v. *Brown* (*y*), where it ★ was held that such promises, if established, constitute [★ 345] no obligation on which an action could be maintained; *à fortiori*, then, the third contention could not avail the defendant. The defendant relied also upon the fact that no fiduciary relations existed at the time when the deed was executed. To this Sir J. Romilly replied that the court "did not proceed on the mere technicality of the existence of such a relation at that moment, if the fact were so, but upon the proof of the degree of influence existing at the time." The decision was upheld by the Lords Justices. "The decree appealed from," said Lord Justice Turner, "is in such entire conformity with the principles and decisions of the court that its validity cannot, in my opinion, be doubted" (*z*).[1]

Exorbitant rewards for services rendered.]—The principle upon which the decisions in these cases rests has never been contested successfully. Hence, where a solicitor made an absolute conveyance by deed to himself of 1,000*l.* from the plaintiff's wife, who, by

(*y*) 13 C. B., N. S. 677.
(*z*) 4 De G., J. & S. 223.

[1] When an instrument between attorney and client is intended to provide a remuneration for past services, then the services must be proved; it must also be proved that there existed at the time of giving it at least a just and moral obligation to pay; that the instrument was fully understood by the person executing it and was made in pursuance of, and in accordance with, a well considered, definite and settled purpose. Brock *v.* Barney, 40 Barb. (N. Y.) 52. If the transaction is fair, honorable and proper, a promissory note and a mortgage to secure its payment, given by a client to a solicitor for professional services, will be sustained. Wharton *v.* Hammond, 20 Fla. 934.

virtue of her marriage articles, had a power to charge certain premises with 1,000*l.*, the consideration expressed in the deed being services done and favours shown, Lord Hardwicke, on all the circumstances of the case, decreed the deed should stand only as a security for such sum as was justly due to the defendant (*a*). "If an attorney, *pendente lite*, prevails upon a client," argued his lordship, "to agree to an exorbitant reward, the court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled" (*b*). So, where an attorney took securities from his client during the continuance of the relation, partly for a gift and partly for the balances of accounts settled, costs and business done, as well as for the price of a horse, Lord Loughborough ordered the accounts to be again opened, and declared the voluntary conveyance void (*c*). Again, where, in consideration that a solicitor would not call for immediate payment of the several bills of costs due from certain clients, one of them agreed to pay the several bills as they were then made out, though one had not been delivered, the agreement was declared void (*d*). Nevertheless, the court does not approve of clients entering into transactions with their solicitors, [★ 346] whereby they obtain from him ★ present relief, and, at the same time, indulge the expectation that the court will afterwards, at their instance, annul the whole transaction on the ground of the relations subsisting between them (*e*). Upon the same principle, where a client told his solicitor to retain a sum of 300*l.* out of moneys coming to the client, the court, on a bill of the client, decreed a general account, with a direction that the defendants were not to be allowed the 300*l.*, and ordered the defendants to pay the costs of the suit, there being no evidence of circumstances to remove the pressure which the court always presumes where a fiduciary relation is proved to exist (*f*).

Gifts—Rules against are absolute.]—The rules with regard to gifts are more stringent than those with regard to purchases. The rules against gifts, it has been said, are absolute; the rules against purchases are modified (*g*). Parol evidence is admissible to prove that no consideration passed between solicitor and client, although a consideration appears on the face of the conveyance (*h*). Whenever a case comes before the courts it must stand upon its own circumstances, and the court will try the application of the principles (*i*).[1]

(*a*) Saunderson *v.* Glass, 2 Atk. 296. (*b*) 2 Atk. 297.
(*c*) Newman *v.* Paine, 2 Ves. jun. 199.
(*d*) Gardner *v.* Ennor, 35 Beav. 549.
(*e*) Per Sir J. Romilly, *ibid.* p. 558.
(*f*) O'Brien *v.* Lewis, 4 Giff. 221; 32 L. J. Ch. 569.
(*g*) Per Lord Justice Turner, in Holman *v.* Loynes, 18 Jur. 543; and see per Lord Thurlow, in Welles *v.* Middleton, 1 Cox. 112; per Lord Eldon, in Hatch *v.* Hatch, 9 Ves. 296; and per Lord Erskine, in Morse *v.* Royal, cited 3 Drew. 315.
(*h*) Tompson *v.* Judge, 3 Drew. 306.
(*i*) Ormond *v.* Hutchinson, 13 Ves. 47, per Lord Erskine.

[1] See *ante*, 342, note 1.

(a.) *In respect of rendering Services.*

Duty of legal adviser in preparing deed or will.]—The principle of the cases to which we are now about to refer is obviously a deduction from the general principle which regulates the dealings of persons in fiduciary positions with their beneficiaries. The principle is, that wherever a professional man is called in to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences likely to result, and requires that he should distinctly and clearly point out to his clients all those consequences from whence a benefit may arise to himself from the instrument so prepared; and if he fails to do so, he will not be allowed to retain the benefit.[1]

Instruments obtained from clients.]—In *Watt* v. *Grove* (*k*), decided in 1805, Lord Redesdale, C., said that when a deed is ★ prepared by the person who seeks the benefit of it with- [★ 347] out the intervention of any other person, that circumstance alone raises a suspicion of fraud; hence "instruments obtained by attorneys from their own clients are always viewed with extraordinary jealousy" (*l*).

Benefit obtained by client levying fine.]—In *Bulkley* v. *Wilford* (*m*), decided in 1834, the House of Lords entered fully into the question. A testator being owner of two estates, bequeathed them by will to his wife and her heirs. The appellant, a solicitor, was the testator's heir presumptive. Before making his will the testator had contracted to sell a part of his real property to the Commissioners of the Royal Hospital at Chelsea. Owing, however, to some complications in the title, it was agreed that the testator should levy a fine of the land contracted to be sold, with a view to the completion of the contract. The appellant had been the respondent's regular attorney for some years. He was now employed to complete the sale, and induced the respondent to levy a fine upon the whole of his real property. This was equivalent to a revocation of the will, of whose existence he was probably aware. The respondent did not know that a fine had this consequence, nor did the attorney explain to him this circumstance. The testator died without declaring the uses of the fine, and without republishing his will. The attorney, after the testator's death, claimed the estate as the heir-at law, and brought action of ejectment to recover possession. Upon a bill for relief being filed in chancery by the widow, an issue was directed. The jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery then decreed him to be a trustee for the

(*k*) 2 Sch. & Lef. 491.
(*l*) See per Lord Chancellor Hart. Segrave v. Kirman, Beat. 157.
(*m*) 2 C. & F. 102.

[1] See page 345, note 1.

devisee. The House of Lords affirmed the decree. Sir E. Sugden, one of the counsel for the respondent, contended that the authorities went only to the length that if a testator was prepared to do a thing which he had power to do, and the person who would take his property if he omitted to do the act, dissuaded the testator from taking any trouble, and engaged to take care of the property, he would be compelled to do what the testator would himself have done. The same learned counsel urged that this was the first case [★ 348] in which ★ a man's legal right had been taken away from him, not upon anything he had done—the jury found he had done nothing improperly—not upon anything he had said; not upon any misrepresentation; not upon any concealment, for nothing was sought to be known; but upon an omission to make a declaration. It was apparent before the judgment of the House of Lords was delivered that Lord Eldon maintained the doctrine that an attorney should not have the benefit of anything, where he derives that benefit from ignorance of that which he ought to know. This view would probably have made his lordship refuse to direct an issue had he sat at the original hearing. Neither Lord Brougham, C., nor Lord Lyndhurst took any part in deciding this case, as they had both been engaged in the action of ejectment. The Earl of Eldon and Lord Wynford were quite at one upon the principles applicable. "I have taken great pains," said Lord Eldon, "to look into this subject, and I do profess myself, if I had heard the cause in the year 1823, it would have been utterly impossible for me to direct an issue to a court of law consistently with my habit, if possible, to save parties the expense of trials of issues, if the case afforded a clear ground of equity between the parties; and in this case I think such clear ground was afforded. I should have thought it my duty, upon the principle which I am now about to state, at once to have said, 'Whether you meant fraud, whether you knew that you were the heir-at-law of the testator or not, you, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it if you had known what you ought as an attorney to have known: and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance'" (*n*). This view proceeds from a consideration of the dangers which would otherwise arise to the interests of mankind if advisers were allowed to take advantage of their own ignorance. The same principle was stated by Lord Hardwicke (*o*) and Lord Chancellor Hart (*p*). Solicitors then must not only give all the information they ought to give; but they shall not plead ignorance of what they ought to know.

(*n*) 3 C. & F. 177.
(*o*) See Barnsley *v.* Powell, 1 Ves. 284.
(*p*) Segrave *v.* Kirwan, *supra*.

No profit to be made out of trust—When.]—For illustrations ★ of the rule that a solicitor, when acting as trustee, is [★ 349] forbidden to make a profit out of his trust in respect of services performed, in the absence of any direction to the contrary in the instrument creating the trust, see *Re Corsellis*, *Lawton* v. *Elwes* (*q*); *Craddock* v. *Piper* (*r*); *Broughton* v. *Broughton* (*s*); *Re Barber* (*t*); *Whitney* v. *Smith* (*u*); *Lincoln* v. *Windsor* (*x*); and *Manson* v. *Baillie* (*y*).

SECT. 6.—*Fiduciary position of Medical Man.*

Medical man and patient—Excessive claims.]—In *Billage* v. *Southee* (*z*), decided in 1852, where relief was granted to a patient from whom a medical man had taken a promissory note for an amount beyond what was due to him, and upon the most extraordinary charges, and at a time when the patient's position in life was about to be changed, Turner, V.-C., said, "I am of opinion a court of equity will not permit this. No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other, and, in my opinion, this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation to the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—to be merely instances of the application of the principle . . . and when a gift is set up between parties standing in a fiduciary relation, the onus of establishing it by proof rests upon the party who has received the gift." [1]

Circumstances under which voluntary deed upheld.]—But in *Pratt* v. *Barker* (*a*) decided in 1828, Lord Lyndhurst refused

(*q*) 33 Ch. Div. 160; affirmed 56 L. T. 411.
(*r*) 1 Mac. & G. 664.
(*s*) 5 De G., M. & G. 160.
(*t*) 34 Ch. Div. 77.
(*u*) L. R., 4 Ch. App. 513.
(*x*) 9 Ha. 158.
(*y*) 2 Macq. H. L. 80.
(*z*) 9 Ha. 534.
(*a*) 4 Russ. 507.

[1] There is, however, no rule of law or morals which prevents ministers of the Gospel from receiving gifts from their parishioners or from other persons, not belonging to their congregation. Greenefield's Est., 24 Pa. St. 233. As to the validity of gifts from nuns to their convents, see the notes to Huguenin *v.* Baseley, 2 Leading Cases in Equity, 622, 6th ed.

[★ 350] ★ to set aside a voluntary deed executed by an old and infirm man in favour of the surgeon who attended him and who had occasionally been consulted by him respecting his property. In this case, however, it was proved (1) that there was no undue influence, the execution of the deed and transfer of property being the voluntary acts of the grantor; (2) that the grantor was acquainted with the nature and effect of what he did; (3) that there had been in the affair the intervention of a disinterested third person.

Summary.]—Where any relation exists by means of which a person is able to exercise a dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can show that the transaction was a righteous one (*b*). But it has been held that this proof is given if it be shown that the donor knew and understood what it was that he was doing in making the gift (*c*). In such cases, said Lord Eldon, "the question is not whether the donor knew what he was doing, but how the intention was produced" (*d*). To the same effect are *Walker* v. *Smith* (*e*); *Billage* v. *Southee* (*f*). The authorities are not at one upon the question whether a gift made by a client to his legal adviser is absolutely void (*g*), if made during the continuance of the relation. In one of the latest cases—*Woodward* v. *Humpage* (*h*), decided in 1861—Stuart, V.-C., expressed an opinion that although the principle of influence vitiated the gift, yet the presumption might be rebutted by circumstances short of the total dissolution of the relation of solicitor and client.

(*b*) Cooke *v.* Lamotte, 15 Beav. 234.
(*c*) Hoghton *v.* Hoghton, 15 Beav. 278.
(*d*) Huguenin *v.* Baseley, 14 Ves. 273.
(*e*) 29 Beav. 394.
(*f*) 9 Ha. 534.
(*g*) See per Kindersley, V.-C., in Tompson *v.* Judge, 3 Drew. 314, and cases there cited.
(*h*) 3 Giff. 337.

END OF VOL. I. EVANS ON PRINCIPAL AND AGENT.

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A Treatise

UPON

THE LAW

OF

PRINCIPAL AND AGENT

IN

CONTRACT AND TORT.

BY

WILLIAM EVANS, B.A. OXON.,
AND OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

FROM THE SECOND (1888) ENGLISH EDITION.

"The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases."—*Lord Mansfield.*

WITH NOTES AND AMERICAN CASES,

BY

J. CLAUDE BEDFORD,
OF THE PHILADELPHIA BAR.

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SECT. 1.—*On Contracts.*

Cases which may arise where agent acts without authority.]—Having considered the liability upon deeds, bills of exchange,

[★ 352] ★ promissory notes, bought and sold notes and charter-parties, which may attach to an agent (*a*), there remain for consideration several other questions. These questions will now be treated in order.

Agents for the Crown.]—But a distinction should be first pointed out between crown agents and other agents. Agents of the crown are not liable upon contracts entered into by them in their public and official character. Neither the governor of a fort (*b*), the first lord of the treasury (*c*), a deputy-commissary-general (*d*), the secretary of war (*e*), nor any such officer, can be sued upon such contracts.

It may be said generally that public agents, whether they are acting for the crown or for a foreign government, incur no personal liability in respect of their contracts (*f*), unless an express personal engagement is shown. A county court clerk who employs a builder to fit up a hall and offices in which to transact the business of the county court does not occupy a position analogous to that of public officers so as to escape personal liability on the ground mentioned (*g*).[1]

(a.) *Where Agent contracts without Authority.*

When an agent assumes to act as agent without authority the following cases may arise:

He may after the determination of his authority act upon a belief that his authority is still in force.

1. Acting upon such belief he may omit to give to the other contracting party such information as would enable that other equally with himself to judge as to the authority under which he proposed to act.

(*a*) See Book II., Part II.
(*b*) Macbeath *v.* Haldimund, 1 I. R. 180.
(*c*) Savage *v.* Lord North, cited *ib.*
(*d*) Palmer *v.* Huchinson, 6 App. Cas. 619.
(*e*) Gidley *v.* Lord Palmerston, 3 Brod. & B. 285.
(*f*) Goodwin *v.* Robarts, L. R. 10 Ex. 76; 44 L. J. Ex. 157; Twycross *v.* Dreyfus, 5 Ch. Div. 605.
(*g*) Autey *v.* Hutchinson, 17 L. J., C. P. 304.

[1] A public agent, acting in the line of his duty, is not personally liable upon contracts made by him on behalf of the Government; unless it appears that the credit was given to, or the labor performed for the agent himself and on his agreement and promise to pay; or the fact of his being a public agent was unknown and not disclosed at the time of making the contract. Nichols *v.* Moody, 22 Barb. (N. Y.) 611; Hall *v.* Landerdale, 46 N. Y. 70; Newman *v.* Sylvester, 42 Ind. 106; Baltimore *v.* Reynolds, 20 Md. 1; Hull *v.* County of Marshall, 12 Iowa, 142; Lyon *v.* Adamson, 7 Iowa, 509; Mann *v.* Richardson, 66 Ill. 481.

There are cases in which a public agent will be liable to an action. See People *v.* Brown, 55 N. Y. 180; Van Hoevenburgh, 45 Barb. (N. Y.) 197. When there is a question as to whether the credit was given to the agent personally or to the principal it must be decided by the jury. See Brown *v.* Bundlett, 15 N. H. 360.

2. Acting upon such a belief he may give to the other contracting party all such information.

The agent may be aware that he has no authority at the time of entering into the cantract, or he may act upon a *bonâ fide* belief that he has authority where none has in fact been conferred, ★ such want of authority not being known to the per- [★ 353] son with whom he contracts.

Liability of wife for goods supplied from husband's death to notice thereof.]—The leading case upon the first point is that of *Smout* v. *Ilbery* (*h*), decided in the year 1842. This was an action for goods supplied to a married woman by the plaintiff, who had been in the habit of supplying the defendant's husband, and who continued to supply the wife after her husband went abroad, where he died. The question for the court to determine was, whether the wife was liable for the goods supplied from the date of her husband's death until the arrival of the news of the death. A verdict having been given for the plaintiff, a rule was obtained to show cause why the verdict should not be set aside and a new trial had, on the ground that the defendant was not liable for the meat supplied after but before she had any knowledge of her husband's death. It had been previously decided that a principal's executor is not liable under the circumstances. The court, having taken time to consider its judgment, which was delivered by Baron Alderson, held that the wife was not liable, on the ground "that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal." [1]

Three cases in which an agent is personally responsible.]—"There is no doubt," said the learned Baron, "that in a case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But, independently of this, which is perfectly free from doubt, there seems to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, when he has no authority, and knows it, but, nevertheless, makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts

(*h*) 10 M. & W. 1.

[1] A. constituted B. his agent and authorized him to sell a pre-emption claim belonging to him; B. sold the land and received the money; the sale was made after the death of A., but in ignorance thereof and in good faith; the purchase money was paid to B. after knowledge, on his part and on that of the purchaser, of the death of A. Held, that A.'s representatives were entitled to recover of B. the purchase money so received. Carriger's Adm. *v.* Whittington's Adm., 26 Mo. 311; see also as to the effect of the death of the principal; Rapp *v.* Phœnix Ins. Co., 113 Ill. 390.

to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to con- [★ 354] tract, and as ★guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the courts have held, that when a party making the contract *bonâ fide* believes that such authority is vested in him, but has no such authority, he is still personally liable.[1] In these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statements which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds that the statement will turn out to be correct. And if that wrong produces injury to a third person who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences." The same judge, in continuation, remarked that on examination of the authorities the court was satisfied that all the cases in which the agent has been held personally responsible will be found to arrange themselves under one or other of these three classes. The present case was distinguished from all these authorities. Here the agent had in fact full authority originally to contract, and did contract, in the name of the principal. There is no ground for saying that in representing her authority she did any wrong whatever. There was no *mala fides* on her part—no want of due diligence in acquiring knowledge of the revocation, no omission to state any act within her knowledge relating to it, and the revocation itself was by the act of God. "The continuance of the life of the principal was, under the circumstances," said the same judge, "a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the case is that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present." And to this conclusion the court came. Some light is thrown upon the latter remarks by an observation made by the same learned judge in the course of the argument. "The question is this, whether where an agent contracts in the name of a [★ 355] principal, and it ★turns out afterwards that there is no

[1] Where a party undertakes to act as an agent for his principal, *bonâ fide* believing that he has authority to enter into the contract in question, he is nevertheless personally responsible if he has exceeded his authority. The fact that he has been guilty of no intentional fraud or moral turpitude does not exempt him from liability; Kroeger *v.* Pitcairn, 101 Pa. St. 311.

principal, and there is no fraud in the case, the agent is liable as the principal." The judgment of the court was also supported by a reference to the ordinary case at common law of a wife who makes a contract in the lifetime of her husband without authority. This case was referred to in argument in a subsequent case (*i*) when Chief Justice Jervis remarked, that there was no representation at all by the defendant (Ilbery), and that the plaintiff was misled by circumstances equally without the knowledge and beyond the control of both parties.

Conclusions drawn from Smout *v.* Ilbery.]—It is clear that the court considered—

First, that all cases in which an agent has been rendered liable for misrepresentation of authority, viz., assuming to act as agent without authority, may be reduced to some one or other of the three classes following:—

1. Where the agent has made a fraudulent misrepresentation.
2. Where he has no authority, and knows it, but nevertheless makes the contract as having such authority.[1]
3. Where, acting as agent under a *bonâ fide* belief that he has authority, he omits to give to the other contracting party such information as would enable that other equally with himself to judge as to the authority under which he proposed to act.[2]

Secondly, the fact that a person assumes to act as agent owing to an honest mistake, is not any ground to free him from liability. The test, in the opinion of the court, whether a person whose assumption of authority was due to an honest mistake is liable for the consequence of his want of authority is, whether or not he has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act.

Untrue representation—Knowledge of agent.]—In *Polhill* v. *Walter* (*k*), which was decided in 1832, an action was brought against the defendant for falsely, fraudulently and deceitfully representing that he was authorized to accept a bill of exchange by procuration. A bill was presented for acceptance at the office of the

(*i*) Randell *v.* Trimen, 18 C. B. 786.
(*k*) 3 B. & Ad. 114.

[1] Woodes *v.* Bennett, 9 N. H. 55; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250.

[2] Dusenbury *v.* Ellis, 3 Johns. cases 70; White *v.* Madison, 26 N. Y. 117; Feeter *v.* Heath, 11 Wend. 477; Long *v.* Colburn, 11 Mass. 497; Noyes *v.* Loring, 55 Me. 408. In order to render the agent personally liable when he falsely represents that he has authority, it is necessary that the contract should be one which can be legally enforced. A contract void by the statute of frauds cannot be enforced directly or indirectly.

It confers no right and creates no obligation as between the parties to it, and no claim can be founded upon it as against third persons. Whatever may be the form of an action at law. If proof of such a contract is essential to maintain it, there can be no recovery. Dung *v.* Parker, 52 N. Y. 494.

[★ 356] drawee when he was absent. The defendant, who ★ lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and on proof of the above facts was nonsuited. The indorsee then sued the defendant. At the trial the jury negatived all fraud in fact, and found a verdict for the defendant according to the direction of Lord Tenterden, leave being reserved to enter a verdict for the plaintiff if the court should be of opinion that he was entitled thereto. The verdict was directed to be so entered for the plaintiff, the court holding that the defendant had made himself liable, on the ground that he had made a representation knowing it to be untrue, and which was intended or calculated from the mode in which it was made to induce another to act upon it to his damage, such representation being a fraud in law. The court relied on the fact that the defendant knew his representation to be untrue. It was said in the course of the judgment by Lord Tenterden, "If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was in point of fact a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false." This is merely an *obiter dictum* at variance with subsequent authorities (*l*).

Smout *v.* Ilbery *distinguished—No misrepresentation.*]—*Randell* v. *Trimen* (*m*), decided in 1856, was an action for a false and fraudulent misrepresentation. The declaration stated that the defendant, who was employed as an architect by A. and others to superintend the building of a church, falsely and fraudulently represented and pretended that he was authorized by A. to order, and did order, stone of the plaintiffs for the building of the said church, for and on account of A., and that the plaintiff, relying on that representation, and believing that the defendant had authority from A. to order the stone on his account, delivered the same, and it was used in building the church; whereas the defendant was not, as he well [★ 357] knew, authorized ★ to order the same. There was another averment that A., refusing to pay for the stone, the plaintiff, trusting in the defendant's representation, sued A. for the price, but failed in the action, and had to pay the cost. Mr. Justice Crowder, before whom the cause was tried, told the jury that if they believed that the defendant represented that he had the authority of the person named to order the stone in his name, and that that representation was untrue, the plaintiffs were entitled to recover the price of the stone, and also the whole taxed costs of the former action.

(*l*) See Godwin *v.* Francis, L. R., 5 C. P. 295; and Randell *v.* Trimen, *infra*.
(*m*) 18 C. B. 786.

A rule for a new trial was discharged. It was argued in support of the rule that the defendant, being honestly mistaken, could not be held liable for misrepresentation. The Lord Chief Justice, however, intimated that such a view was wrong, and distinguished *Smout* v. *Ilbery* (*n*), on the ground that the defendant in that case had made no representation at all.

Erroneous assumption of authority.]—When a person in error assumes that he has authority to make a contract for another, by assuming that he has such authority, he warrants that he had that authority which he has represented himself to have. If any principal contracts with the agent relying upon such assumption, to what damages is he entitled upon the breach of such contract? The rule is well established that he is entitled to what he actually lost by the non-performance of the contract, to be put in the same position as if the representation was true (*o*).[1] Some doubts were expressed in the Court of Appeal in *Ex parte Panmure*, *In re National Coffee Palace Co.* (*p*), which was decided in 1883, as to this principle, but it was acted upon and applied to the case of a broker who had contracted without authority.

By solicitor.]—Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party (*q*).

★ *By a jobber.*]—If a jobber on the Stock Exchange [★ 358] gives the name of a purchaser of shares, and the name turns out to be that of one who has no legal capacity to accept the shares, the original contractor, *i. e.* the jobber, will remain liable, though the time limited is allowed to go by without objection to such person (*r*).

By directors of a company.]—Where the agents or directors of a company, which has no power to accept bills, accept in their representative capacity a bill payable to order and addressed to the company, the acceptors may be personally liable on the dishonour of the bill, either on the ground that as between themselves and the plaintiffs, who were *bonâ fide* indorsees for value, they had been guilty of

(*n*) 10 M. & W. 1.
(*o*) See Spedding *v.* Nevell, L. R., 4 C. P. 212; Godwin *v.* Francis, L. R., 5 C. P. 295; and Simons *v.* Patchett, 7 E. & B. 568.
(*p*) 24 Ch. Div. 367.
(*q*) Newbiggin Gas Co. *v.* Armstrong, 13 Ch. Div. 310.
(*r*) Nickalls *v.* Merry, L. R., 7 H. of L. 530.

[1] That is, he cannot be sued upon the contract itself but is only liable for damages. When one who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally. Duncan *v.* Niles, 32 Ill. 532.

constructive fraud by issuing a bill which contained an untrue statement that they were authorized to accept on behalf of the company, or upon the ground that apart from fraud, they were precluded from denying the truth of any statement contained in their acceptance of a negotiable instrument, or on the ground that there was evidence of an implied contract that they were authorized to accept the bill on behalf of a company (*s*).

By next friend of married woman.]—Where an action was commenced in the name of a married woman by her next friend, who was unable to show his authority, the action was dismissed with costs, to be paid by the solicitor of the next friend (*t*).

(b.) *Where an Agent contracts in his Own Name.*

Parol evidence to free agent from liability, when not admissible.]—Where an agent enters into a contract in his own name, he is *prima facie* liable upon that contract, and the question arises whether parol evidence is admissible to relieve the agent of this *prima facie* liability. It may be laid down generally that, wherever an agreement is made, parol evidence may be given to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal; and this whether the agreement be or be not [★ 359] required to be in writing by the Statute of Frauds. ★ This evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal (*u*). In other words, where an agent contracts in his own name, parol evidence is admissible to charge the principal, but not to discharge the agent, except in the cases to be noticed hereafter.[1]

Contract by agent in his own name.]—*Norton* v. *Herron* (*x*), 1825, was an action for breach of the following agreement:—"Memorandum of an agreeement . . . . . between George Herron (the defendant) on behalf of Edward Barron, of the one part, and J. Norton of the other . . . . . the said G. H. doth hereby agree to execute a lease . . . . . to hold from." The

(*s*) West London Commercial Bank *v.* Kitson, 12 Q. B. Div. 157.
(*t*) Schjott *v.* Schjott. 19 Ch. D. 94.
(*u*) *Per Cur.* in Higgins *v.* Senior, 8 M. & W. 844.
(*x*) 1 C. & P. 648.

[1] The rule that parol evidence cannot be given to contradict or vary a written instrument does not preclude a party, who has contracted with an agent, from maintaining an action against the principal, upon parol proof that the contract was, in fact made for the principal, although the agency was not disclosed by the contract and was not known to such party at the time of making it. Coleman *v.* First National Bank of Elmira, 53 N. Y. 388.

tenant in possession refused to quit, and the plaintiff could not obtain the lease. "It is said," remarked Chief Justice Best, "that as the defendant entered into the contract on behalf of Barron, therefore the action should be brought against Barron. The case of the deed (*y*) is stronger than this; but the last case cited (*z*) was that of a simple contract. In that case, it was held that the word solicitor was mere description, and I cannot distinguish between that case and the present; and I am of opinion that the agreement is binding on the defendant. The cases of brokers are different, because there the fact of agency is known to every one; but, in this case, the man, after describing himself as agent, goes on to contract in his own name."[1]

The case of *Wilson* v. *Hart* (*a*), 1817, has caused some confusion by being referred to as one of the earliest cases illustrating the liability of agents. The decision, in that case, is one upon the liability of undisclosed principals only. The marginal note is quite misleading.

Evidence may be given to charge unnamed principal but not to discharge agent.]—In *Jones* v. *Littledale* (*b*), decided in 1837, the question was definitely raised. This was an action for non-delivery of hemp. The defendant's brokers at Liverpool sold ★ hemp [★ 360] by auction at their rooms, and gave the following invoice:—"—— Jones. Bought of J. and H. Littledale. Sixty-four bales of hemp. . . . . Settled, Nov. 26." (Signed by defendant's clerk.) It was argued that parol evidence was admissible not only to charge a party not mentioned in the contract, but also to exonerate the seller named on proof of his agency. Such evidence was held not to be admissible to free the defendant from liability.[2]

In a considered judgment of the court, it was observed by Lord Denman:—"There is no doubt that evidence is admissible on behalf of one of the contracting parties, to show that the other was an agent only, though contracting in his own name, and so to fix the real plaintiff; but it is clear that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." It was observed by the court, in *Higgins* v. *Senior* (*c*), that the decision in

(*y*) Appleton *v.* Binks, 5 East, 148.
(*z*) Burrell *v.* Jones, 3 B. & A. 47.
(*a*) 7 Taunt. 295.
(*b*) 6 Ad. & El. 486.
(*c*) 8 M. & W. 845.

[1] Southard *v.* Sturtevant, 109 Mass. 390; Welch *v.* Goodwin, 123 Mass. 71; Baldwin *v.* Leonard, 39 Vt. 260; Hall *v.* Bradbury, 40 Conn. 32; Keen *v.* Sprague, 3 Greenl. (Me.) 77; Newman *v.* Greef, 101 N. Y. 663; Sire *v.* Faures, 15 La. An. 189; Youghiogheny Iron Co. *v.* Smith, 66 Pa. St. 340; Wheeler *v.* Reed, 36 Ill. 81; Einstein *v.* Holt, 52 Mo. 340; Bank *v.* Stein, 24 Md. 447; Woodbury *v.* Blain, 18 Iowa, 572.

[2] Hyde *v.* Wolf, 4 La. 234.

this case might be supported on the ground that the agent really intended to contract as principal. *Jones* v. *Littledale* was commented upon in *Holding* v. *Elliott* (*d*), in which case, however, the point was whether an invoice was in itself a contract, or merely evidence of a contract. In the latter case, the jury found that the real contract was not contained in the invoice; and the court decided that a mere invoice is not itself a contract, so as to exclude parol evidence to the effect that the name stated as vendor is, in fact, not that of a contracting party. "It is said," remarked Baron Martin, "that it is difficult to distinguish this case from *Jones* v. *Littledale;* it may be so, but it seems to me a mistake pervades that judgment. It supposes that if there be a parol contract which does not satisfy the Statute of Frauds, an invoice afterwards sent becomes the contract." Baron Channell distinguished the latter case, on the ground that the sale there was by broker and by auction, that there was evidence of custom at Liverpool to contract as principal, in order to insure the money passing through their hands. He also thought that the decision in that case might be supported on the ground (suggested by Mr. Justice Coleridge) that, as brokers, the defendants, by their dealing, undertook to deliver.

[★361] ★ *Personal undertaking by clerk.*]—In *Weidner* v. *Hoggett* (*e*), which was decided in 1876, the plaintiff had refused to sign a charter-party without an undertaking from the charterers that there should be no undue detention of his ship. The defendant, who was a clerk employed to arrange the terms for loading, accordingly gave the following undertaking:—"I undertake to load the ship in ten colliery working days, on account of Bebside Colliery, W. S. Hoggett." Upon a claim being made by the captain for demurrage, the defendant denied liability, but offered a sum in satisfaction. The jury found that the contract was between the captain and the defendant, that there was sufficient consideration for it, and that the contract was with the defendant personally. The court held that the admission and contract fully sustained the findings of the jury.

Evidence of usage.]—In *Magee* v. *Atkinson* (*f*), 1837, evidence of usage to exonerate an agent from personal liability was rejected. The defendants were sharebrokers, one of whom, T., sold to the plaintiff, through his broker, S., fifty South Western Railway shares. An entry of this sale was made on the defendants' books as of a sale from them to S. A contract note to the same effect was sent to S. T. afterwards sold other shares to B., and directed notes to be sent to him as well as to S. Finding that the note had already been sent to S., and in the defendant's name, he altered the entry in the book, inserting the name of J., his principal, for fifty shares, as sellers, and directed another note to be sent to S., with J.'s name as seller. S. received the two notes together; neither note was returned, nor did the defendants wish to have the first re-

(*d*) 5 H. & N. 117. (*e*) 1 C. P. Div. 533. (*f*) 2 M. & W. 440.

turned. Mr. Justice Patteson left it to the jury to say whether the second note was a correction of a mistake in the first, and told them that if the defendants signed the contract in their own names they were liable, although known to be agents, but rejected evidence to show that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name. Verdict was given for the plaintiff. A rule for a new trial, on the grounds of misdirection and rejection of evidence, was refused, "The custom offered to be proved," said Baron Alderson, "is a custom to violate the common law of England. The court held that it was properly left to the jury to say say whether the ★ second [★ 362] note was a disclosure of the plaintiff's name at the time of the contract, or whether it was adopted as a variation of the contract.

Evidence of agent that contract was for third parties, rejected.]—*Higgins* v. *Senior* (*g*), 1841, was an action for the non-delivery of iron. The defendants, iron merchants and iron commission agents, gave to the plaintiffs' agents a sold note, in the following terms:—"We have this day sold through you to Messrs. V. Higgins and Son. John Senior & Co., Wm. Senior." Baron Rolfe, before whom the trial was heard, told the jury that if the above note was the contract the defendants were liable, whether they intended to act for themselves or the company; that the defendants were notoriously agents; but if they chose to sign a contract in their own name they were responsible. The learned judge refused to admit evidence to prove that the contract was entered into on behalf of a third party. The jury found for the plaintiffs. A rule obtained for a nonsuit or a new trial was discharged, the court holding that *Magee* v. *Atkinson* (*h*) was a direct authority, and undistinguishable from this case.

Agent contracting as agent, not liable.]—There is no doubt at all in principle that an agent as such, merely contracting as agent and not as principal, makes a contract from the very nature of things between his principal and the other contracting party, and incurs no personal liability upon the contract himself. Consequently when a contract in terms says, "Sold to A. B." or "Sold to my principals," and the agent signs himself as "broker," he does not make himself by that either purchaser or seller of the goods; he is simply the broker making the contract. On the other hand, it is equally clear that the rule of law laid down in the case of *Higgins* v. *Senior* (*g*) is perfectly correct, namely, that where the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he declares himself to be the contracting party, he thereby says, "I am to be liable" (*k*).[1]

(*g*) 8 M. & W. 834. (*h*) 2 M. & W. 440.
(*k*) See per Hill, J., in Deslandes v. Gregory, 2 E. & E. 607; 30 L. J., Q. B. 36.

[1] Where the drawer of a check signs it "A. B. Agent," that mode of signing

Agent of undisclosed principal—Effect of custom.]—There is another class of cases in which an agent who enters into a written contract as agent for an undisclosed principal may be [★ 363] ★ made personally liable upon the contract upon the evidence of a custom recognizing such liability (*l*).

Fleet v. *Murton* was followed in 1873 by what must be considered as a much stronger case. In *Hutchinson* v. *Tatham* (*m*) the action was brought on a charter-party, which was expressed to be made between the plaintiffs and the defendants, "as agents to merchants," the defendants signing "as agents to merchants." At the trial it was proved that in making the charter-party, they had acted as agents for L., and were authorized to do so; but evidence of a trade usage was admitted to the effect that if the principal's name is not disclosed within a reasonable time after the signing of the charter-party, the broker shall be personally liable. The Court of Common Pleas held that this evidence was admissible, on the authority of *Humfrey* v. *Dale* and *Fleet* v. *Murton*. "It does seem a strong thing," said Mr. Justice Brett, "when a person expressly says to another in a written document that he is not contracting with him as principal, and in signing that writing states the same thing again, to hold that it can be any evidence, and afterwards be established, that he is liable not as agent but as principal. . . . . So strong do I consider the terms of the contract in this respect, taking the terms in the body and the signature together that were evidence offered to show that from the beginning the defendants were liable as principals, I should be prepared not to admit it; but the cases have gone very far lately as to the admissibility of evidence of custom." The evidence of custom that is inadmissible must be evidence of something inconsistent and irreconcilable with the written contract.

In *Pike* v. *Ongley* (*n*), a case decided in 1887, Lord Esher, M. R., and Fry, L. J., reversing the decision of Day and Wills, JJ., held that evidence was admissible to show that by the custom of the hop trade brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as

(*l*) Humfrey *v.* Dale, 27 L. J., Q. B. 390; Fleet *v.* Murton, L. R., 7 Q. B. 126.
(*m*) L R., 8 C. P. 482.
(*n*) 8 Q. B. D. 708.

does not disclose the fact that the drawer is the agent of any one, and, if that is the only indication of his agency, he will be bound personally as the drawer. Bickford *v.* First Nat. Bank of Chicago, 42 Ill. 239.

A person may draw, accept or endorse a bill by his agent, and it will be as obligatory upon him as though it were done by his own hand, but the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact done for him, or the principal will not be bound, the particular form of the execution is not material if it be substantially done in the name of the principal. Pentz *v.* Stanton, 10 Wend. (N. Y.) 271. See, also, Einstein *v.* Holt, 52 Mo. 340.

principals, although they contracted as brokers for a principal, and although they were not asked to disclose their principal. "If any remarks of mine in the judgment in *Hutchinson* v. *Tatham* (*o*)," said Lord Esher, "are in conflict ★ with our present de- [★ 364] cision they must be considered as withdrawn."

Cases where the alleged agent is the principal.]—Where a person describes himself in a written instrument as the agent of an unnamed principal, it is open to the other contracting party to show that the so-called agent is in fact the principal.

Carr v. *Jackson* (*o*), which was decided in 1852, was an action for freight. The defendant signed the charter-party "on behalf of another party resident abroad." It contained a clause that all liability of the defendant should cease "as soon as he had shipped the cargo." The freight was to be paid on delivery of the cargo. A verdict entered for the plaintiff was set aside and a non-suit entered on the authority of *Dounman* v. *Williams* (*p*) on the ground that the defendant had *primâ facie* acted, and been trusted by the plaintiff as an agent, and no evidence had been given to show that he was in fact the principal; the purchase of the cargo by the agent in his own name is not such evidence (*p*). This is the converse of *Schmalz* v. *Avory* (*q*).

Summary of exceptions.]—Lastly, with respect to the admissibility of parol evidence to vary an agent's *primâ facie* liability upon a written contract, it may be said that an agent may show by parol evidence:—

(1.) That although a written instrument, purporting to be a contract, has been signed by himself and the other contracting party, it was not their intention in signing that it should operate as a contract (*r*).

(2.) That although he has signed a written contract apparently as principal, he in fact signed as agent for a third party, and the plaintiff verbally agreed that he should not be responsible as principal (*s*).[1]

(3.) That he entered into the contract through duress, mistake, or fraud.[2]

(*o*) *Supra.*
(*o*) 6 Ex. 382; 21 L. J., Ex. 137.
(*p*) 7 Q. B. 103.
(*q*) 16 Q. B. 655.
(*r*) See Rogers *v.* Hadley, 2 H. & C. 227.
(*s*) Wake *v.* Harrup, 30 L. J., Ex. 273; affirmed 31 *ib.* 451.

[1] Dubois *v.* Del. & Hudson Canal Co., 4 Wend. 285; Hall *v.* Huntoon, 17 Vt. 244.

[2] A contract, whether entered into by principal or agent, if obtained by duress, is void. A public officer, who, by virtue of his office, demands and takes unauthorized or illegal fees, may be compelled to make restitution; and where such fees are paid to such officer, even though paid without protest or notice of intention to reclaim, it is not a voluntary payment. American Steamship Company *v.* Young, 89 Pa. St. 186. See also Chandler *v.* Sanger, 114 Mass.

These exceptions to the general rule that a party may be added but not discharged by parol evidence, are in truth not exceptions at all, for the reasons stated by the Lord Chief Baron (*t*).

[★ 365] ★ The first question only will be dwelt upon here; the second has already been examined (*u*), whilst the third belongs rather to the general law of contracts than to that of agency.

Agent may show that the contract is not contained in instrument produced.]—It may then be laid down as a rule that an agent may show by parol evidence, that, although a written instrument purporting to be a contract has been signed by himself and the other contracting party, it was not their intention in signing that it should operate as a contract, and that the real contract was not in writing. This is a departure from the general rule, that, although parol evidence which goes substantially to alter a written agreement cannot be received, yet collateral circumstances may be proved by parol as a defence. Thus duress, fraud and circumvention may be proved by parol; for although they affect the validity of the agreement, they do not vary it (*x*). The principle has been thus stated by Baron Bramwell in *Rogers* v. *Hadley* (*y*): "Where the parties to an agreement have professed to set down their agreement in writing, they cannot add to it, or subtract from it, or vary it in any way by parol evidence; otherwise they would defeat that which was their primary intention in committing it to writing. But where at the time when a document, which is apparently an agreement, was signed, the parties expressly stated that they did not intend it to be a record of any agreement between them, though this is a conclusion of fact which a jury should adopt with extreme reluctance, the parties would not in such a case be bound by the document. Whether the signature is or is not the result of a mistake is immaterial. The reasoning proceeds on this ground, that the parties never intended that the document should contain the terms of an agreement between them" (*z*).

Collateral circumstances may be proved by parol.]—In *Davis* v. *Symonds* (*a*), 1787, a bill was brought to compel the specific performance of an agreement by which the defendants, S. H. and O., agreed, in consideration of 800*l.*, to convey certain premises to the plaintiff and H., H. being a joint contractor with the plaintiff Orwell [★ 366] as one of the defendants. The contract ★ was made

(*t*) Davis *v.* Symonds, *infra.*
(*u*) See Book II., Part. II., Ch. III., sect. 2.
(*x*) See Sugden's Vendors and Purchasers, p. 159, 14th ed.
(*y*) 2 H. & C. 249.
(*z*) See Pym *v.* Campbell, *infra.*
(*a*) 1 Cox, Eq. Ca. 402.

364; Sooy *v.* The State, 38 N. J. L. 324; Lefebore *v.* Dutruit, 51 Wis. 326; Chicago & Alton R. R. *v.* Chicago Coal Company, 79 Ill. 121.

A contract made in ignorance of a material fact, or under a plain and injurious mistake, is voidable. Roberts *v.* Fisher, 43 N. Y. 159. Fraud vitiates every contract into which it enters. Dermott *v.* Jones, 2 Wall. (U. S.) 1.

with S.; O. was a mortgagee under H. The latter had taken a conveyance from S. to himself. The plaintiff alleged that this had been done in breach of the agreement, and that O. took under H. with notice of the plaintiff's right, and, therefore, could not affect the plaintiff's interest. The material defence was, that though this agreement purported to be an agreement by which H., one of the defendants, and D., the plaintiff, were to be joint purchasers of the estate for a sum of money to be advanced by them jointly, yet that the real meaning of it was that H. should be the purchaser, and D. was only to have some interest in the premises by way of security for such part of the purchase-money as he should advance for H. The defendants, therefore, contended that these facts might be proved by parol evidence, and the court held that they might do so. "At nisi prius," said the Lord Chief Baron, "when an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so, there is an end of all parol evidence, for when parties express their meaning with solemnity, this is very proper to be taken as their final sense of the argument [? agreement] . . . In this way only is the Statute of Frauds material, for the foundation and bottom of the objection is in the general rules of evidence. I take this rule to apply in every case where the question is, what is the agreement? And this rule applies no further than this precise question; for as often as the question is, what were the collateral circumstances attending the agreement? so often may such collateral circumstances be proved by parol evidence. There is no law which says such collateral circumstances may not be proved by parol evidence. If any of the collateral circumstances are reduced into writing, then the same rule applies to them as to the original agreement; but if not, both at law and in equity such collateral circumstances may be proved by parol."

Parol evidence admitted to show that contract not that contained in bought and sold notes.]—*Rogers* v. *Hadley* (*b*), decided in 1863, affords a good illustration of the principle under examination. The action was brought not against an agent, but by a person who professed to act as agent. The plaintiff sued upon what purported to be a written contract, in which he, as C.'s agent, sold a quantity of bark to the defendants at a price to be subsequently ★ as- [★ 367] certained by C. in a manner agreed on. At the trial it appeared that the plaintiff induced the defendants to sign a bought note, which described the plaintiff as the seller at an ascertained price per ton, by representing that this price was nominal, and that as the defendants were dealing with the crown, whose officer C. was, they would incur no risk. A day was fixed by the note on which a deposit of 20 per cent. was to be paid. The plaintiff had in fact bought the bark from C. by verbal contract, but had not paid for it. Before the deposit was paid, the plaintiff sent the defendants

(*b*) 2 H. & C. 227.

an invoice on the basis of the terms mentioned in the bought note, and requested them to pay the deposit to C. They did so. The plaintiff afterwards treated the sale as a sale by himself as principal, at the price in the bought and sold notes, and the Court of Exchequer held that parol evidence was admissible to show that the bought and sold notes did not really contain the contract between the parties.

In an earlier case (*c*) it had been decided that parol evidence is admissible to show that a document, apparently a written agreement, was signed without any intention of making a present contract, but that it was to be conditional upon the happening of an event which had not occurred.

The result of the authorities is, then, that an agent cannot, any more than any other contracting party, give evidence to vary the terms of a written agreement; but he, like any other contracting party, may give evidence to show that the written agreement contains no contract.[1]

Specific performance against agent.]—Where specific performance of a contract entered into by an agent is claimed, the agent is not a necessary party to the action, "unless the agency be not proved, or there may be special circumstances which may render it proper to make him a defendant, as where the agent claimed to have entered into the contract for his own benefit" (*d*).

Liability to injunction, or action for infringing patent.]—As to the agent's liability to an action or injunction for infringing a patent, see *Adair* v. *Young* (*e*), the case of a master of a ship; *Betts* v. *De Vitre* (*f*); *Betts* v. *Neilson* (*g*); *Sykes* v. *Howarth* (*h*); *Noble's Explosive Co.* v. *Jones* (*i*); *Cohen* v. *Poland* (*j*).

[★ 368] ★ (c.) *Where the Agent has received Money.*

Recovery from agent of money paid to him for his principal.]—When a sum of money has been paid into the hands of an agent for the use of his principal, or by his principal for third parties, it may become important to consider, under what circumstances that

(*c*) Pym *v.* Campbell, 6 El. & Bl. 370; 25 L. J., Q. B., 277.
(*d*) Fry Sp. Per., p. 108, 2nd ed.
(*e*) 12 Ch. D. 19.
(*f*) 11 Jur. N. S. 11.
(*g*) 6 N. R. 221.
(*h*) 12 Ch. D. 926.
(*i*) 8 App. Cas. 1.
(*j*) W. N. July 30th, 1887, p. 159.

[1] In an action upon a broker's note in which the goods are named as "sold for account of" the plaintiff to the defendant, "cash terms 30 days," it is competent for the defendant to show by parol, in the absence of evidence that the broker was his general agent, that the contract signed by him was not the real contract between the parties, which was a sale by sample. Remick v. Sanford, 118 Mass. 102.

sum, or any part of it, may be recovered from the agent personally. A variety of cases are possible. For instance, when the money has been paid for the use of the principal, the money may have been paid through fraud or by mistake. The agent may have transferred it to his principal, and the transfer again may have been with or without notice, or the agent by reason of the payment to him, may have done something which will be to his prejudice if the payment to him is declared void. Further, the agent may be in the position of stakeholder; or again he may claim to retain the money in satisfaction of an illegal demand; or whilst acting for an undisclosed principal, he may hold himself out to be a principal. Such are some of the possible combinations of the circumstances which might have to be considered before a decision could be arrived at of the question whether, in a given case, an agent was personally liable to repay money which had been handed over to him. The result of the authorities may be thus summarized.

Summary.]—First, as to cases where money is paid to the agent for the use of his principal. An agent to whom money has been mispaid for the use of his principal is not personally liable to the person who makes the payment—

(1.) Where the agent has paid over the money to his principal without notice (*k*);

In one case (*l*) where the agent or clerk in an office gave a receipt for the money received, and subsequently received notice, the court held that the receipt given was the receipt of the principal.

(2.) Where, before notice, the situation of the agent has been altered by anything done by him upon the assumption that the payment was good (*m*).

★ The agent will be personally liable to the third party— [★369]

(1.) Where the agent pays over the money to his principal after notice;

(2.) Where the agent, being a stakeholder, receives a deposit, which he pays over before the conditions upon which it is to be paid are fulfilled (*n*);

(3.) Where the agent retains money in satisfaction of an illegal claim, and pays it over to his principal, provided the maxim *in pari delicto* does not apply (*o*).

Where money has been paid to an agent, the courts have declined to allow an action to proceed against the agent for the purpose of trying the validity of a right claimed by the principal (*p*).

Duration of liability.]—An agent who receives money for his

(*k*) Pond *v.* Underwood, 2 Raym. 1210; East India Company *v.* Trillon, 3 B. & C. 280.

(*l*) Stephens *v.* Badcock, 3 B. & Ad. 354.

(*m*) Buller *v.* Harrison, Cowp. 565.

(*n*) See cases *infra*.

(*o*) Towson *v.* Wilson, 1 Camp. 396; Goodall *v.* Lowndes, 6 Q. B. 464; and cases *infra*.

(*p*) Sadler *v.* Evans, 4 Burr. 1984.

the plaintiff had been allowed to occupy whilst in prison. The governor accounted for the sum received at the quarter sessions. Lord Kenyon directed a verdict for the plaintiff. The gaoler had no authority by the regulations of the prison to let rooms.[1]

Payment to principal without notice.]—The *ratio decidendi* adopted in the case of *Pond* v. *Underwood* (*g*), decided in 1705, is applicable in the present day. This case overruled *Jacob* v. *Allen* (*h*). It was an action by an executor for money received by the defendant and owing to the testator. At the trial, it appeared that before the will was found administration was granted to the testator's sister, who gave to the defendant a warrant of attorney to receive the money in question. He received the money accordingly, and paid it over to the administratrix before any notice of the will. Lord Holt nonsuited the plaintiff, on the ground that no action lay against the defendant, as he had paid the money over to his principal without notice.[2]

Where an action is brought against an agent, not on the ground that the payment was made by mistake, but for the purpose of testing a right claimed by the principal, the action will not lie. Thus it was ruled in an old case, that where a man receives money for another under pretence of right (*e. g.*, for tithes), the court will not suffer the principal's right to be tried in an action against the collector or receiver, if the defendant can show the least colour of his right in his principal, as, for example, by having been for some time in possession (*i*).[3]

[★372] ★*Action for money had and received —Right to an inheritance.*]—In *Sadler* v. *Evans* (*k*) decided in 1766, the action was brought with the intention to try the right of Lady W. to a certain quit rent. Baron Perrott nonsuited the plaintiff, being of opinion that the right to an inheritance of the principal could not be tried in an action for money had and received brought against the agent. A rule to set aside the nonsuit was discharged. From some of the observations of the court, it might be inferred that they thought the general rule to be that payment, or no payment, by the agent was immaterial; but these remarks must be taken subject to the particular circumstances of the case. Lord Mansfield distinctly said that when payments are made to a known agent, the action ought to be brought against the principal, "unless in special cases, or under notice, or *mala fide*"

(*g*) 2 Lord Raym. 1210.
(*h*) 1 Salk. 27.
(*i*) Staplefield *v.* Zewd, Bull. N. P. 133; and see Sadler *v.* Evans, 4 Burr. 1984.
(*k*) 4 Burr. 1984.

[1] Amer. Steamship Co. *v.* Young, 89 Pa. 186; Chandler *v.* Sanger, 114 Mass. 364. Lehman *v.* Shackleford, 50 Ala. 437.
[2] See note to Bank of U. S. *v.* Bank of Washington, page 370. See also O'Connor *v.* Clapton, 60 Miss. 349.
[3] See First Nat. Bank *v.* Watkins, 21 Mich. 483.

Action to recover insurance moneys placed to account of principal.]—*Buller* v. *Harrison* (*l*) decided in 1777, was an action to recover a sum of 2,100*l.* paid as due upon a policy of insurance to the defendant as agent for the insured. The agent placed the money to the account of the principal. After payment, the plaintiffs discovered that the money was not due, and gave notice to that effect to the agent. At the trial, Lord Mansfield left it to the jury to say whether the action could be maintained against the defendant as agent, and ruled that it depended on whether the fact that the defendant had placed the money to the account of his principal was equivalent to a payment of it over. The jury found for the defendant. A rule *nisi* for a new trial was made absolute by the court. "In general, the principle of law is clear," said Lord Mansfield, "that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it. . . . On the other hand, it is just that as the agent ought not to lose, he should not be a gainer by the mistake. And, therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake, the agent cannot afterwards pay it over to his principal without making himself liable to the real owner for the amount." His lordship was of opinion that the question was one of law and not of fact, and that the direction to the jury should be, that, if they were ★satisfied the [★ 373] money was paid by mistake, and that the defendant's situation was not altered by any new circumstance since, they ought to find for the plaintiff.[1]

Overpayment to agent.]—Lord Mansfield's statement of the law was adopted in *Cox* v. *Prentice* (*m*), which was decided in 1815. The defendant had received from his principal a bar of silver, which he took to the plaintiffs, who melted it, and, having obtained an assay at defendant's expense, paid the latter as for the number of ounces of silver which by the assay it was calculated to contain. The number paid for was afterwards discovered to exceed the true number. The plaintiffs offered to return the bar. The court held that they might sue the defendant for the price, although he had sent his account to the principal, and in it had placed the price received to the credit of his principal. On behalf of the defendant, it was contended that at the time of the sale the agent was ignorant of the value, and that even if he had affirmed that the silver was of a particular value, neither he nor the principal would be liable unless he knew it not to be of that value, or warranted it to be so. But here the buyers fixed the price by the estimate of a third person. The contention was of no avail. "This," said Lord Ellen-

(*l*) Cowp. 565.
(*m*) 3 M. & S. 344.

[1] Hooper *v.* Robinson, 98 U. S. 528.

borough, "is a case of mutual innocence and equal error. . . . Much of the argument has been raised by the circumstance of a third person having been introduced into this transaction; but the nature of the commodity made the intervention of some other standard than the parties' own judgment necessary." As to the position of the assayer, the court agreed that he was a middleman, or if an agent for one party only, he was rather an agent for the defendant.[1]

Action against sub-agent—no privity.]—*Stephens* v. *Badcock* (*n*) was decided in 1832. An attorney, who was accustomed to receive dues for the plaintiff, left his clerk, the defendant, in charge of the office. The defendant, whilst so in charge, received money on account of the above dues for the plaintiffs, and gave a receipt signed "B. for M. J." (his master). The latter left home and never returned, but it did not appear that his intention so to act was known to the defendant. The defendant refused to pay the money over to the plaintiffs, who then brought this action. At the trial it was [★ 374] contended that, ★ as the defendant acted only as clerk to the attorney in receiving the dues at the time of payment on behalf of the plaintiffs, the action should have been brought against his principal; and, secondly, that there was no privity between the plaintiff and defendant. Mr. Justice Taunton ruled that the money was recoverable, as having been paid to the defendant under a mistake, and not paid over by him to his principal before notice. A rule *nisi* to enter a nonsuit was made absolute, the court being of opinion that the money could not be recovered from the defendant as money paid to him in a mistake. The defendant, it was held, received it as the attorney's agent, and the receipt given was the receipt of the principal, and, if he had not been bankrupt, would have been evidence against him in an action brought by the present plaintiff.[2] Want of privity between the agent and third parties has often proved fatal to the right of the latter to recover money from the agent. Thus, where there were several joint owners of a ship, and B., the managing owner, employed C. as general agent, and to receive and pay moneys on account of the ship. C. kept a separate account in his books with B. as managing owner. To obtain payment of a sum of money due from a certain company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner. Upon a receipt

(*n*) 3 B. & Ad. 354.

[1] Where agent not liable. Granger *v.* Hathaway, 17 Mich. 500.

[2] An account was placed in the hands of an attorney for collection. The debtor paid part of the claim to another person who occupied the same office with the attorney, and received a receipt from him as for said attorney. This person had no business connection with the attorney, and no authority from him or from the creditor to receive said payment, which act was not ratified by the creditor, but was ratified by the attorney, who never received the money so paid, and who afterwards repudiated said act, on learning that his client had never received the money so paid; it was held that the creditor was not bound by such payment. O'Connor *v.* Arnold, 53 Ind. 203.

being signed by A., one of the other owners, C. received on account of the ship 2,000*l.* from the company in question, and placed it to B.'s credit in his books as managing owner. The other part owners brought an action to recover the balance of that account against the agent, but the court held he had received the money as agent of B, and was accountable to him for it, and that there was no privity between the plaintiffs and the defendant (*o*).

Liability of agent in respect of money which he is bound to pay over to principal.]—An agent cannot be called upon to restore to third parties money which he has paid over to his principal, which he had no right to withhold from his principal. Certain bills of exchange were drawn upon and accepted by the East India Company in favour of W. H. They were afterwards indorsed to D. and C. by an agent of W. H., under a supposed authority given by a power of ★ attorney, which was seen and inspected by the acceptors. [★ 375] D. and C. indorsed the bills to B. and Co. (the defendants), their bankers, in order that the latter might, as their agent, present them for payment when due. B. and Co. put their names on the back of the bills, presented them for payment, and received the amount. This they paid over to their principals. When it was discovered that the power of attorney did not authorize the agent to indorse the bills, the administrator of W. H., in an action against the acceptors, recovered the amount of them. The acceptors then brought an action against B. and Co., and declared on a supposed undertaking that they, as holders, were entitled to receive the amount of the bills. The jury found that the plaintiffs paid the bills on the faith of the power of attorney, and not of the indorsement by the defendants, and that the latter paid over the money before they had notice of the invalidity of the first indorsement. The court decided that there was no ground for the action (*p*). It is to be noticed that the power of attorney was not produced by the defendants, nor was there any evidence that they had any means of estimating its sufficiency; and further, that the insufficiency of the authority was not discovered until the money had been paid over by the defendants to their principals, and that if there was negligence it was due to the plaintiffs' mistake on a point of law (*q*).[1]

Distinction between liability of agent and that of stakeholder.]—A question may arise whether the defendant was a stakeholder, or rather the agent of one of the parties in a transaction. Thus, in

(*o*) Sims *v.* Brittain, 4 B. & Ad. 375.
(*p*) The East Indian Co. *v.* Trillon, 3 B. & C. 280, 1824.
(*q*) See Bilbie *v.* Lumley, 2 East, 469.

[1] It is the duty of an agent to pay over to his principal all monies which he receives for him, even though paid on an illegal contract.
Daniels *v.* Barney, 22 Ind. 207; Hancock *v.* Gomez, 58 Barb. 490; Baldwin *v.* Potter, 46 Vt. 402; Bain *v.* Clark, 39 Mo. 252; Chinn *v.* Chinn, 22 La. An. 599; People *v.* Brown, 55 N. Y. 180. Nor can the agent dispute his principal's title. Day *v.* Southwell, 3 Wis. 657.

Bamford v. *Shuttleworth* (*r*), where, on the sale of certain premises by auction, the memorandum of agreement was signed by the auctioneer as agent for the purchaser and by the vendor's attorney. The purchaser paid his deposit to the attorney, who gave a receipt signed by him as agent for the vendor. The sale went off through the vendor's default, and the court held, inasmuch as the attorney was merely the vendor's agent, and not a stakeholder, an action for the deposit could not be maintained against him. The defendant had applied the money in question in payment of certain expenses upon the instruction of the vendor, but the court did not dwell upon this circumstance.

[★ 376] ★ *Premature payment by stakeholder.*]—In an early case, where an action was brought by the depositor to recover from an auctioneer a deposit which had not been paid over to his principal, the Court of King's Bench intimated that if a stakeholder receives a deposit and pays it over before the conditions upon which it is to be paid are fulfilled, he is nevertheless liable to repay it (*s*).[1]

Deposit paid over by agent.]—In *Edwards* v. *Hodding* (*t*), which was decided in 1814, an attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, and after queries raised on the title, but before they were cleared, paid over the deposit to his principal. The buyer re-demanded the deposit, on the ground that there was no good title, but the auctioneer refused it. He had paid over the money to the vendor prior to the request to refund. The court held him nevertheless liable to repay it to the buyer. The only question in the case, as pointed out by Gibbs, C. J., was whether payment to his principal by the defendant freed him from liability. This question was decided in the negative, in a great measure owing to the fact that the defendant was an attorney, and therefore capable of judging of the value of the vendor's title. The dictum of the court in *Burrough* v. *Skinner* (*u*) is well established (*x*).

(d.) *Where the Principal directs a Payment to Third Parties.*

Appropriation of money to use of third person—Liability of agent.]—An agent who has received money from his principal to pay to a third person, is liable to the latter in an action; but in order to render the agent liable to a third person, there must be a specific appropriation of the money to the use of such third person assented to by the agent (*y*). Nice questions may be raised with

(*r*) 11 A. & E. 926.
(*s*) Burrough *v.* Skinner, 5 Burr. 2, 639.
(*t*) 5 Taunt. 815.
(*u*) *Supra.*
(*x*) Baird *v.* Robertson, 1 M. & G. 981; Bamford *v.* Shuttleworth, 11 A. & E. 926.
(*y*) Paley, by Lloyd, p. 394; Williams *v.* Everett, 14 East, 582.

[1] Carew *v.* Otis, 1 Johns. (N. Y.) 418.

reference to the evidence required of such an assent on the part of an agent to hold remittances for and on behalf of a third party as will render the agent liable to the third party. It was argued in *Malcolm* v. *Scott* (*z*), which was decided in ★ 1850, that [★ 377] the third party is not bound to prove a positive contract on the part of the agent to pay over the money, but that it is enough to show an attornment by the agent to his principal's order. In that case the defendants were directed by their principal to hold a sum of money at the disposal of the plaintiff, a creditor of the principal. The defendants accordingly wrote to the plaintiff "to advise" him of their principal's request, adding, "At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." The defendants afterwards wrote to their principal that the state of the accounts did not warrant the payment to the plaintiff. The court held that the defendants had entered into no positive engagement to pay the money, and that consequently the plaintiff had no right of action.

Appropriation to meet acceptance.]—Lord Ellenborough said in *Willis* v. *Freeman* (*a*), that the case of *Wilkins* v. *Carey* (*b*) established the principle that if a man who has funds in his hands belonging to a trader who has committed a secret act of bankruptcy, accept a bill for that trader without knowing of such act of bankruptcy, he may apply those funds when the bill becomes due, and to the discharge of his own acceptance. The same judge ruled in another case (*c*), that if A. is under acceptance to B., he may retain money of B.'s in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it. So it was held in a subsequent case (*d*), that where a sum of money has been lodged with a party to indemnify him against bills of exchange accepted by him for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although they are within the Statute of Limitations. The question was much discussed in a later case decided by the Common Pleas in 1850 (*e*). The action was brought by the assignees of a bankrupt to recover from the defendant a sum of money lodged in his hands to ★ meet an ac- [★ 378] commodation bill of which he was the acceptor and the bankrupt the drawer. Before the maturity of the bill the drawer became bankrupt, and the court held that the assignees could not recover.

(*z*) 5 Ex. 601.
(*a*) 12 East, 656.
(*b*) 7 T. R. 711.
(*c*) Madden *v.* Kempster, 1 Camp. 12.
(*d*) Morse *v.* Williams, 3 Camp. 418.
(*e*) Yates *v.* Hoppe, 9 C. B. 541.

"The question is," said Mr. Justice Maule, "whether the bankrupt could have revoked that destination of the money, and could have called upon the defendant to return it to him. . . . An act done in performance of a binding contract is not revocable. The acceptance of the bill was a good consideration for the contract to indemnify."

Refusal by agent to apply money as directed by principal.]—*Williams* v. *Everett* (*f*), decided in 1811, was another action for money had and received brought to recover 300*l.*, being part of the amount of a bill remitted by one Kelly, resident abroad, to the defendants, his bankers, in England. In his letter accompanying the bill K. said, "I remit you by the 'Warley' 1,216*l.* 2 *s.*, which I particularly request you will order to be paid to the following persons, who will produce their letters of advice from me." Amongst the persons named was the plaintiff. Before the bill became due the plaintiff gave Everett notice of a letter he had received from K. ordering his debt to be paid out of that remittance. At the same time he offered the defendants an indemnity. The latter, however, refused to indorse the bill away or to act upon the letter. The question was whether the plaintiff was entitled to receive from the defendants the amount of the debt due to him from K. out of the money which was admitted to have been received when the bill became due. At the trial Lord Ellenborough nonsuited the plaintiff, on the ground that as the defendants had renounced the terms on which the bill was remitted before the money was actually received, the money was only money had and received to the use of the remitter of the bill. The ruling was upheld by the full court. The judgment was delivered by Lord Ellenborough, who said, "It will be observed that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal to the creditor so to do. . . . By the act of receiving the bill the defendants agree to hold it till paid, and its contents, when paid, for the use of the remitter. It is en- [★ 379] tire ★ to the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance they cannot retract the consent they may have once given, but are bound to hold it for the use of the appointee."

New appropriation of money in hands of agent.]—The doctrine laid down in this case was applied in *Brind* v. *Hampshire* (*g*), and

(*f*) 14 East, 582; and see Patorni v. Campbell, 12 M. & W. 277; Cobb v. Beck, 6 Q. B. 936.

(*g*) 1 M. & W. 365.

Scott v. *Porcher* (*h*). This right of the remitter to make any new appropriation of his money as he might think fit, and so relieve the agent of liability upon the original appropriation, was recognized in *Stewart* v. *Fry*, 1817 (*i*). There the acceptor of a bill remitted funds to his bankers, the defendants, to meet it. The defendants finding the bill was sent back as dishonoured, remitted the money to the acceptor. Upon a subsequent presentment of the bill they refused payment, and the court held that they were not liable to the holder for the amount remitted. On the same grounds, where the maker of the promissory note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder of the note, on condition of having it delivered up; but the note being mislaid, this condition was not complied with, and the agent afterwards became bankrupt with the money in his hands, Lord Ellenborough ruled that the maker was still responsible on the note (*j*).

Williams v. *Everett* (*k*) has been cited frequently in cases where the plaintiff claimed money in the hands of an agent, but failed for want of privity. See *Cobb* v. *Beck* (*k*) and *Robbins* v. *Fennell* (*l*), which were actions brought by a client to recover money from the town agents of the country solicitor. The rule is that no one can call upon an agent to account but his own principal (*m*). But the rule has no application where a person is compelled to pay money in order to obtain possession of his ★ rights, for in that [★ 380] case the law implies a promise to repay what has been improperly obtained (*n*).

Williams v. *Everett* (*o*) was applied in *Garrard* v. *Lauderdale* (*p*). The authorities of this class were examined in 1886 by Bacon, V.-C., in *Henderson* v. *Rothschild* (*q*), where the agent before receiving the money gave notice of a date on which payment would be made in full to the creditors. Before that date the principal revoked the agent's authority to pay in full, and it was held that a creditor had no cause of action against them (*r*).

The term appropriation examined by Eyre, C. J.]—In *Bolton* v. *Puller* (*s*), decided in 1796, A. & Co. were bankers at Liverpool, and two members of the firm, namely, C. and D., carried on a separate

(*h*) 3 Meriv. 652.
(*i*) 7 Taunt. 339.
(*j*) Dent v. Dunn, 3 Camp. 296 (1812).
(*k*) *Supra.*
(*l*) 6 Q. B. 930.
(*m*) Stephens v. Badcock, 3 B. & Ad. 354; and see New Zealand Co. v. Watson, 7 Q. B. Div. 374.
(*n*) Wakefield v. Newson, 6 Q. B. 276.
(*o*) 14 East, 582.
(*p*) 2 Russ. & My. 451.
(*q*) 33 Ch. Div. 52.
(*r*) See Cosser v. Radford, 1 De G., J. & Sm. 585; Kirwan v. Daniel, 5 Ha. 493, 500; Johns v. James, 8 Ch. Div. 744.
(*s*) 1 B. & P. 539; followed in Johnson v. Robarts, 44 L. J., Ch. 465.

business in London. The plaintiff having accepted bills payable to the house of C. and D., employed A. & Co. to get them paid accordingly, and deposited with them good bills indorsed by them for the purpose of enabling them so to do. A. & Co. debited the plaintiff in account for his acceptances, and credited him for all the bills which he deposited. Some of the bills so deposited by the plaintiff were remitted by A. & Co. to C. and D., upon the general account between the two houses. Before any of the acceptances of the plaintiff became due both houses failed, and J. S. was obliged to pay his own acceptances. The Court of Common Pleas held that the assignees of C. and D., namely, the defendants, were entitled to retain against the plaintiff the bills remitted to them by A. & Co. The judgment of the court was delivered by Chief Justice Eyre, who treated the case as a middle one between those in which it has been held that bills in the hands of a factor in the event of a bankruptcy must be delivered up, subject only to rights of lien, and those in which it is held that if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against this third person. "The true nature of that transaction," said his lordship, "has been warmly [★ 381] disputed in the course of the argument. ★Bolton paid into his bankers' hands these bills on his general account for a particular purpose. This has been called an appropriation; and legal consequences are deduced from them as if appropriation was a technical term, or at least was used in some definite or precise sense; whereas no term in perpetual use can be more general or more uncertain in its import. . . . So far from being appropriated to any particular purpose in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. Bolton's credit with his bankers, and in the nature of things they could not be applied in specie to the particular purpose of paying Mr. Bolton's acceptances in London. These bills, at least the bills in question, were remitted to the house in London on the general account of the banking houses. We cannot think that there was a misapplication, or that the confidence of Mr. Bolton was abused." This decision was mainly relied on by Vice-Chancellor Malins in *Johnson* v. *Roberts* (*t*), decided in 1875. The plaintiffs were customers of a county bank, the defendants were the London agents of that bank. The acceptances of the plaintiffs were usually made payable at the London Bank. The plaintiffs having paid into their account to the former bank the sum of 2,422*l.* 8*s.* in cash, notes and bills, to meet acceptances, that bank sent a printed letter to the defendants with the bills and notes, "Be pleased to make undermentioned payments, &c., at the debit of the County Bank." A few days afterwards that bank stopped

(*t*) L. R., 10 Ch. 505.

payment, the defendants refused to pay the amounts due on the acceptances, but retained the bills and notes as having been remitted to them in the ordinary course and without any reference to the acceptances. A bill praying a declaration that the defendants were trustees of the bills and notes was dismissed. This decision was affirmed in the Court of Appeal.

Bill drawn on agent payable out of particular fund.—In *Stevens* v. *Hill* (*u*), decided in 1805, Lord Ellenborough ruled that when a bill is drawn on an agent, and made payable out of a particular fund, if the agent says he will pay it when he gets money of the principal, this is binding upon him, and if he gets money at a subsequent time he is bound to pay the bill. His lordship remarked that a similar case of an army agent had been tried ★before [★ 382] Lord Kenyon, in which case the agent had promised to pay the draft of a person on him, and, having neglected to do so, an action being brought, Lord Kenyon ruled that the promise of the agent was an appropriation of so much to the use of the holder of the draft, and made him liable on the receipt of any money upon the credit of which it was drawn.

Appropriation of a fund in hands of third person.—Since the year 1842, when *Walker* v. *Rostron* (*x*) was decided, it has been considered as settled law that when a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then the money becomes a fund received, or to be received for and payable to the transferee, and when it has been received an action for the money lies at the suit of the transferee against the holder. In *Walker* v. *Rostron* the plaintiff had sold goods to A., and received his acceptances for the price. These were transmitted to the defendant, as A.'s agent, who consigned them to his partners abroad. For further security it was agreed between the plaintiff A. and one of the defendant's partners authorized for that purpose, that A. should write and deliver to the defendant a letter authorizing him, out of any remittances he might receive against the net proceeds of the consignments, to pay the acceptances as they became due, if not honoured by A. previously. The letter was delivered to the defendant, and he assented to its terms. A. became bankrupt before the bills were due. The defendant refused to carry out the terms of the letter, but upon receiving them handed over the net proceeds to the bankrupt's assignees.

"I think," said Lord Abinger, who delivered the judgment of the court, "there can be no doubt upon the whole that the real transaction, and the real object and arrangement of the parties,

(*u*) 5 Esp. 247.

(*x*) 9 M. & W. 411.

was this—to apply the proceeds in the hands of the defendant, so far as it could be done, the goods being abroad, but the proceeds being destined to come to him, and that he should undertake so to [★ 383] apply them." The court was quite of ★opinion that this was identical with the case of a party engaging himself to appropriate the proceeds of goods according to certain directions of the owner, a case which fell "within that class of cases where, when an order has been given to a person who holds goods, to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement." The decision was approved of, and applied by the Court of Queen's Bench in *Griffin* v. *Wheatherby* (*y*).

Accounts taken between principal and agent may amount to payment.]—A. paid into the Totness County Bank a quantity of notes of a bank at Dartmouth, to bear interest from that day. The Totness bankers sent the notes early on the following morning to the Dartmouth bank. Upon their receipt there the latter, according to their usual course of business with the Totness bankers, gave them credit in account for the amount of the notes. The course of dealing between the two banks was, that if the Totness bank received notes of the Dartmouth bank in the course of the day, they sent the notes on the following morning to the Dartmouth bank. If the Dartmouth bank received notes of the Totness bank, they, at the close of the business of the day, sent them to the Totness bank. If the balance of the day was in favour of either bank, the amount was paid by a bill upon their respective agents in London. The Dartmouth bank continued to pay their notes until the evening next following the day on which A. paid the notes into the Totness bank. In an action by A. against the Totness bankers, he recovered the amount of the notes, on the ground that as between the plaintiff and defendants the taking of credit in account for the amount of the Dartmouth notes was equivalent to payment to the Totness bankers (*z*). Here the Dartmouth bankers were made the agents of the Totness bankers, the latter authorizing the former, by the course of dealing, to give credit in account for their own notes, instead of paying them immediately in money. If the notes had been of no value at the time they were deposited, the case, as pointed out by Mr. Justice Holroyd, would have been very different.

[★384] ★*Summary.*]—The following principles appear to be deducible from the cases:—

1. An agent who receives money for his principal is liable to third parties as regards such money so long as he stands in his original situation, *i. e.*, so long as things remain unaltered between the agent and principal, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it.

2. Upon the sale of an article by an agent, if the thing sold

(*y*) L. R., 3 Q. B. 753. (*z*) Gillard *v.* Wise. 5 B. & C. 134 (1826).

turns out to be of less value than the price given for it, the extra price, in the absence of fraud or warranty, cannot, as a general rule, be recovered back. But this rule is applicable only to cases when the thing sold is of an arbitrary value.

3. When a principal directs his agent to pay money over to a third party, the direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel, or the money to the remittee, or by some binding engagement entered into between the agent and the remitter, which gives the latter a right of action against the agent (*a*).

4. An appropriation is not revocable when the principal remits money to the agent to be applied by the latter pursuant to a binding contract between the parties in discharge of a contingent liability (*b*).

5. Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was aware at the time of the illegal disbursements, or if he subsequently assented to them. Thus, where the agent of a candidate at an election for a member of parliament made extravagant outlays for the purpose of taking up the freedom of the voters, the candidate being aware of the object of the expenditure, was not allowed to recover the excess (*c*).

6. The agent of a foreign government is not liable as such to any action, nor will a plaintiff be allowed to sue a foreign government indirectly by making its agents in this country defendants, and alleging that they have money of the government which they ought to apply in satisfaction of the plaintiff's claim (*d*).

★ *Assignments since* 1873.]—The Judicature Act, 1873, [★ 385] s. 25, sub-sect. 6, provides that any absolute assignment by writing, under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge of the same without the concurrence of the assignor; provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming

(*a*) Williams *v.* Everett, *supra;* Scott *v.* Porcher, *supra;* Brind *v.* Hampshire, *supra.*

(*b*) Yates *v.* Hoppe, 9 C. B. 541.

(*c*) Bayntum *v.* Cattle, 1 Moo. & Rob. 263.

(*d*) Twycross *v.* Dreyfus, 5 Ch. Div. 605; 46 L. J., Ch. 510; 36 L. T. Rep., N. S. 752.

under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead (*e*) concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the acts for the relief of trustees. See the equitable rule stated by Lord Cottenham, C., in *Burn* v. *Carvalho* (*f*), and by Lord Selborne, C., in *Addison* v. *Cox* (*g*).

SECT. 2.—*In Tort.*

General rule—Agent liable for misfeasance, not for negligence.]—An agent or servant, except in the case of a master of a ship (*h*), is not liable to third parties for acts of negligence, but he is liable for acts of misfeasance. Thus Chief Justice Holt drew the distinction in a very early case (*i*), that if a bailiff who has a warrant from the sheriff to execute a writ suffers his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bail- [★ 386] iff turns the prisoner loose, the action may ★ be brought against the bailiff himself, for then he is a kind of wrongdoer or receiver; nor will an action lie against a steward or manager for damage done by the negligence of those employed under him in the service of his principal (*k*). The rule is that an agent is personally liable to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done (*l*).[1] In the latter case the agent is liable only to his employer.[2] So the person bringing an animal to the common pound, and not the pound-keeper, is liable to the penalties imposed by 12 & 13 Vict. c. 92, s. 5, for neglecting to provide such animal with food and water (*m*).

Sale by agent after notice of third party's claim.]—An agent is also personally liable to third parties if, when employed to sell, he sells after notice that the property does not belong to his principal. Thus, in an action against an auctioneer employed to sell a bank-

(*e*) See Order I., r. 2.
(*f*) 2 Myl. & Cr. 702.
(*g*) L. R., 8 Ch. Ap. 79.
(*h*) Morse *v.* Slue, 1 Vent. 238.
(*i*) Lane *v.* Cotton, 12 Mod. 488.
(*k*) Stone *v.* Cartwright, 6 T. R. 411.
(*l*) Paley, by Lloyd, 397.
(*m*) Dargan *v.* Davies, 2 Q. B. Div. 118; 46 L. J., M. C. 122.

[1] Crane *v.* Onderdonk, 67 Barb. (N. Y.) 47; Horner *v.* Lawrence, 37 N. J. L. 46; Berghoff *v.* McDonald, 87 Ind. 549; Harriman *v.* Stowe, 57 Mo. 93; Richardson *v.* Kimball, 28 Me. 464.

[2] Hall *v.* Landerdale, 46 N. Y. 70; Labadie *v.* Hawley, 61 Tex. 177; Reid *v.* Humber, 49 Ga. 207; Brown Paper Co. *v.* Dean, 123 Mass. 267; Feltus *v.* Swan, 62 Miss. 415.

rupt's interest in a house, where it was proved that the landlord's solicitor called on the defendant before the sale, showed him the counterpart of the lease, and the inventory, desiring him not to sell such fixtures as were there inventoried, on the ground that they belonged to the landlord, that the defendant promised not to sell, but nevertheless sold, Lord Ellenborough ruled that an action by the landlord's vendee lay to recover the produce of the sale (*n*).

Liability of Agent for Conversion.

Sale of goods obtained by false pretences.]—Where a person who has obtained goods by false pretences pledges them with an auctioneer, who afterwards sells them, to be repaid his advance, the latter is answerable to the owner of the goods for their value (*o*).

The liability to an action for conversion to which agents, such as auctioneers or brokers, are exposed proceeds from a principle of wide application. That principle was stated by Lord Chelmsford in 1875 in *Hollins* (appellants) v. *Fowler* (respondents) (*p*), in the following terms: "Any person, who, however innocently, obtains possession of the goods of a person ★ who has been [★387] fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."[1]

In *Hollins* v. *Fowler* (*q*), which was finally decided in 1875, the facts were simple. The appellants (the defendants) bought cotton from one Bayley. In doing so they acted as brokers, intending to sell the cotton to any of their customers, charging them a commission only. At the time of the purchase they had no principal; but they subsequently sold it to a customer. The cotton sold had been obtained from the respondents (the plaintiffs) by fraud, but the appellants were not aware of that fact.

In an action brought by the respondents against the appellants to recover the value of the cotton, the jury found that it was bought by the appellants as agents in the course of their business, and that they dealt with it only as agents to their principal. The trial was held before Willes, J., who ordered the verdict to be entered for defendants, leave being reserved to the plaintiffs to move to enter the verdict for them. The Court of Queen's Bench, consisting of Mellor, Lush, and Hannen, JJ., made absolute a rule calling upon the defendants to show cause why the verdict should not be entered

(*n*) Hardacre *v.* Stewart, 5 Esp. 103.
(*o*) Hardman *v.* Booth, 1 H. & C. 803.
(*p*) L. R., 7 H. L. 757; affirming judgment of Queen's Bench, L. R., 7 Q. B. 616.
(*q*) *Ubi supra.*

[1] Kimball *v.* Billings, 55 Me. 147; Barrett *v.* Warren, 3 Hill (N. Y.), 348. See Van Brunt *v.* Schenck, 11 Johns. 377; Spraights *v.* Hawley, 39 N. Y. 441; Acker *v.* Camp, 23 Wend. (N. Y.) 372.

for the plaintiffs. The defendants appealed. In the Exchequer Chamber the judges were equally divided. Kelly, C. B., Byles and Brett, JJ., thought the verdict should be entered for the defendants: Martin, Channell, and Cleasby, were of opinion that the judgment of the Queen's Bench was right. The judgment of the court below therefore stood affirmed. The defendants appealed to the House of Lords, where the appeal was heard by Lord Cairns, C., and Lords, Chelmsford, Hatherley, and O'Hagan, assisted by Blackburn, Mellor, Brett, and Grove, JJ., Cleasby and Amphlett, BB. The question submitted to the judges was whether, under the circumstances stated, the respondents (the plaintiffs) were entitled to have a verdict entered for them for the value of the cotton. Blackburn, Mellor, and Grove, JJ., answered the question in the affirmative; Brett, J., and Amphlett, B., in the negative. The noble and learned lords agreed with the decision of the majority, and unanimously affirmed the decision of the Queen's Bench and Exchequer Chamber. [★ 388] ★ "The defendants," said Lord Hatherley, "were brokers, and as such had the habit of making purchases on the expectation that clients would take the goods from them; but in the particular matter with which we have to deal they purchased for themselves in their own name, and on their own responsibility. They had no principal at the time of the purchase." Then, referring to the difficulty presented by the finding of the jury, his lordship continued: "We must take it as the jury found, that the defendants acted as brokers or agents in their purchase from Bayley; but, as has been observed already, the case shows that the defendants frequently purchased, not intending to sell for profit on their own account, but taking their chance of finding customers who would adopt the bargain, and content to accept their commission as the only advantage resulting to themselves. In this sense, and according to this usage, they might properly, perhaps, though not in perfectly unexceptionable language, be said to have acted as brokers in the dealings before us; but they were not merely brokers, negotiating only as such, and representing in the ordinary way principals, disclosed or undisclosed, and had other relations to the goods with which they meddled, and quite other interests than they would have had if they had been simple negotiators, or 'mediums of communication between buyer and seller,' according to the description of Kelley, C. B. They do not seem to me to have been rightly likened to the carrier or the packer, who is merely such a medium, and the jury may have been warranted in holding that their dealings were in one sense conducted by them as brokers, according to their peculiar course of business, and with a view to commission and not to sale, although in another sense they had not the purely representative and intermediary character, without regard to personal results of meddling with other men's property, which might have relieved them from the stringent doctrines of trover and conversion."

Dealings with property by innocent agent.]—To what extent then

may an innocent agent deal with goods at the request of his principal, who has fraudulently obtained such property? The principal enunciated by Blackburn, J., in *Hollins* v. *Fowler* (*r*), was stated in the following terms:—"One who deals with goods at the request of the person who has the custody of them in the *bonâ fide* belief that he is the true owner, ★ or has the authority of the [★ 389] true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was a finder of the goods or entrusted with their custody." His lordship did not suppose that this principle embraced all the cases in which the agent should be excused. Possibly a principle which would embrace all cases may be stated in the following terms: An agent who deals with goods at the request of the person who has the custody of them, in the *bonâ fide* belief that he is the true owner, or has the authority of the true owner, is excused for what he does, provided such dealing does not consist in transferring the dominion over and property in the goods.[1]

Sale by auctioneer without notice.—An illustration of the exception to the rule as to the agent's liability was given by Day and Wills, JJ., in *Turner* v. *Hockey* (*s*), which was decided in 1887. In that case the court held that an auctioneer who in the ordinary course of his business sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion (*t*).[1]

For other decisions, see *Cochrane* v. *Rymill* (*u*), where an auctioneer, at the request of a grantor of an unregistered bill of sale, sold certain cabs comprised in the bill, was held liable in trover after payment to the grantor; and *National MercantileBank Limited* v. *Rymill* (*x*), where the defendant was held not to be liable on the ground that he did not sell, but merely re-delivered the goods to the order of the grantor who had entrusted them to the defendant.

Although the facts of the case may not support an action of trover, still the agent may, as in *Tredale* v. *Kendall* (*y*), be liable for a rescue as between him and the true owner who has a right of distress.

If the agent is a tort feasor he will be personally liable.]—In *Perkins* v. *Smith* (*z*), which was an action in trover, decided in

(*r*) *Ubi supra.*
(*s*) 56 L. J., Q. B. D. 301.
(*t*) See *per* Bramwell, L. J., Cochrane *v.* Rymill, 27 W. R. 777; and Greenway r. Fisher, 1 C. & P. 190, the case of a packer; Hollins *v.* Fowler, was distinguished.
(*u*) 27 W. R. 744; 40 L. T. 744.
(*x*) 44 L. T. 767.
(*y*) 40 L. T. 362.
(*z*) 1 Wils. 328.

[1] An auctioneer without notice is personally liable on sales of stolen goods. Courtis r. Cane, 32 Vt. 232.

1752, against a servant, who disposed of goods, the property of another, to his master's use, it was objected that the action [★ 390] was ★ improperly brought against the servant, but the court held that the question was whether the servant was a tort-feasor, and that, if he were so, no authority derived from his master would excuse him. The same rule applies when an auctioneer is an innocent tort-feasor; for instance, when he sells goods which do not belong to the execution debtor (*a*). Lord Ellenborough, in considering whether the fact that the agent's act is committed in unavoidable ignorance for his principal's benefit frees the agent from personal liability, stated the rule to be, that a person is guilty of a conversion who intermeddles with property and disposes of it, and it is no answer that he acted upon authority from another, who had himself no authority to dispose of it (*b*).[1]

Possession of agent, when not possession of principal.]—The authorities show that the doctrine, that the possession of an agent is the possession of a principal, has no application to the case of a wrongdoer. Hence the action for money had and received has been held to lie to recover back money which had been obtained through compulsion under colour of process by an excess of authority, although it had been paid over (*c*). A sheriff issued a warrant on mesne process to distrain the goods of A.; the bailiff levied the debts upon the goods of B., and paid it over, but the court held that money had and received lay against the bailiff (*d*). The same doctrine has been expressed by saying that the law does not recognize the relation of principal and agent as existing amongst wrongdoers (*e*).[2]

Agent assisting in principal's fraud.]—An agent or servant who joins with and assists his master in the commission of a fraud is civilly responsible for the consequence, and it is immaterial that his concurrence is unknown to the party injured (*f*). This proceeds from the general rule, that all persons directly concerned in the commission of a fraud are to be treated as principals. No person will be allowed to excuse himself on the ground that he acted as the agent or as the servant of another, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in committing a fraud (*g*).[3]

(*a*) Fairbrother *v.* Ansley, 1 Camp. 343. See Turner *v.* Hockey, *supra.*
(*b*) Stephens *v.* Elwall, 4 M. & Sel. 259. See Turner *v.* Hockey, *supra.*
(*c*) Snowdon *v.* Davis, 1 Taunt. 359. (*d*) *Ibid.*
(*e*) Sharland *v.* Mildon, 5 Ha. 469.
(*f*) Cullen *v.* Thompson, 6 L. T 870; 4 Macq. H. of L. Cas. 441.
(*g*) Per Lord Westbury, C., *ibid.*

[1] Boylston *v.* Bain, 90 Ill. 283; Van Wyck *v.* Walters, 81 N. Y. 352.
[2] Isaacs *v.* Third Avenue R. R., 47 N. Y. 122; Vanderbilt *v.* Richmond Turnpike Co. 2 N. Y. 479.
[3] Burnap *v.* Marsh, 13 Ill. 535; Spraights *v.* Hawley, 39 N. Y. 441; Wright *v.* Eaton, 7 Wis. 595; Josselyn *v.* McAllister, 22 Mich. 300; Richardson *v.* Kimball, 28 Me. 463.

★ *Issue by directors of false reports supplied by officers of company.*] [★391]—In *Cullen* v. *Thompson* (*h*), which was decided by the House of Lords in 1862, the directors of a joint-stock company issued false and fraudulent reports, the statements for such reports having been supplied by the secretary and other officers, who knew that they were false, and were to be used for the purpose of deceiving the public. The plaintiff, acting upon such reports, bought shares in the company, and thereby suffered loss. The House of Lords held that each of the officers of the company who knowingly assisted in the fraud was personally liable for the loss caused to the plaintiff by the misrepresentations in the report, although such report was signed only by the directors, and not by the subordinate officers. With respect to the question of law, whether the remedy for false and fraudulent representations made to the public is limited to the persons who have avowedly made these representations, or whether persons who have joined in preparing and manufacturing such false representations are liable to the parties injured, although their names did not appear and were unknown to such parties, Lord Westbury observed that both upon principle and authority the remedy is co-extensive with the injury, and that a right of action is given to the party injured by the fraud against all persons who joined in committing it, although the concurrence of some of those persons might be unknown to the party injured at the time of the injury (*i*).[1]

Directors liable for fraud to which they are parties.]—In *Cargill* v. *Bower* (*k*), when a question arose whether directors of a company are liable for the fraud of their co-directors or of any other agent of the company, such directors not having actually or tacitly authorized such fraud, Fry, J., following *Weir* v. *Barnett* (*l*), held that, notwithstanding *Peek* v. *Guerney* (*m*), a director of a company is only liable for his own personal fraud, or for the fraud of his co-directors or of any other agent of the company which he has expressly authorized or connived at; and that the opinions expressed by the Lords in *Peek* v. *Gurney*, that B., who had not been a party to the issue of the fraudulent prospectus complained of in that case, was nevertheless liable for it, must be taken to have been founded on a conclusion of ★ fact that he had authorized his co- [★ 392] directors to issue a prospectus of the kind which was actually issued.

Representation of solvency of company.]—In another case, the directors of a joint-stock company, in order to sell their shares to advantage, represented in their reports, and by their agents, that

(*h*) *Supra.*
(*i*) See Henderson *v.* Lacon, L. R., 5 Eq. 249.
(*k*) 47 L. J., Ch. 649.
(*l*) 3 Ex. Div. 32.
(*m*) L. R., 6 H. L. 377.

[1] See cases in note 1, page 336, *ante.*

the affairs of the company were very prosperous, when they were, in fact, insolvent, A person who had been induced by these means to purchase shares, filed his bill to be repaid the purchase-money, and a demurrer for want of equity was overruled by Sir Launcelot Shadwell (*n*). The bill was filed against a director guilty of misrepresentation, and the objection that other parties should be joined was held immaterial.

Inaccurate description of goods—Broker's liability.]—It is settled law, that independent of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another act on the faith of it, and to alter his position to his damage (*o*). Hence an action against brokers for falsely and fraudulently deceiving their principal is not supported by proof that the brokers have given him an inacurate description of goods purchased for their principal. The declaration should have charged the defendants with a neglect of this duty (*p*).[1]

Distinction between misrepresentation of fact and mistake in law.]—In all the cases in which an agent has been held personally liable for misrepresentation, it will be found that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and there appears to be no doubt, to use the words of Lord Justice Mellish (*q*), that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware, in point of fact, what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not; the agent is not liable. Hence, when three directors of a railway company, by a letter to the company's bankers, requested them to honour the cheques of the company signed by two [★ 393] of the directors and ★ countersigned by the secretary of the company, and cheques were accordingly drawn signed in the above manner, and were paid by the bank, the court held that the letter did not amount to a representation that the directors had more than the ordinary authority of railway directors (*r*).

Master of ship.]—The reason assigned by Lord Holt (*s*) for holding a principal liable for the acts of his deputy is that, as he as principal has power to put him in, so he has power to put him

(*n*) Stainbank *v.* Fernley, 9 Sim. 556.
(*o*) Evans *v.* Collins, 5 Q. B. 804, 820; Ormrod *v.* Huth, 14 M. & W. 651.
(*p*) Thom *v.* Bigland, 8 Ex. 725.
(*q*) Beattie *v.* Lord Ebury, L. R., 7 Ch. 777; 41 L. J., Ch. 804.
(*r*) *Ibid.*
(*s*) 12 Mod. 489.

[1] Fraudulent misrepresentations by agents of corporations to induce sale of stock, is not a defence to an action for the amount of one's subscription.
First Nat. Bank *v.* Hurford, 29 Ia. 579; Buffalo, &c., R. R. *v.* Dudley, 14 N. Y. 336; Goodrich *v.* Reynolds, 31 Ill. 490.

out. In general merchant ships the captains have a power of hiring their sailors, and so far are considered as independent of their owners; and the reason given by Molloy (*t*) why the master of a ship is held responsible for the acts of the mariners within the scope of their authority, is that they are of his own choosing, and he may reimburse himself out of their wages for any injury they may have committed.[1] But the master is not liable for the wilful act of one of the crew (*u*).[2]

Postmaster-General and other public officers.]—The case of the postmaster-general is like that of all other public officers, such as the lords commissioners of the treasury, the commissioners of the customs and excise, the auditors of the exchequer, who are not liable for any negligence or misconduct of the inferior officers in their several departments (*x*). *Lane* v. *Cotton* (*y*), *Whitfield* v. *Lord Le Despencer* (*z*) the cases of the postmaster-general, and *Nicholson* v. *Mouncey* (*a*), the case of the captain of the man-of-war, are authorities that when a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the government was the principal, and the defendant merely a servant. All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury ★ from the parish ways being out of repair, [★ 394] though no action can be brought against his principals, the inhabitants of the parish (*b*).[3]

(*t*) B. 2, c. 13, s. 13.
(*u*) Bowcher *v.* Noidstrom, 1 Taunt. 568.
(*x*) Per Lord Mansfield in Whitfield *v.* Lord Le Despencer, Cowp 754.
(*y*) 1 Ld. Raym. 646.
(*z*) 2 Cowp. 754.
(*a*) 15 East, 384.
(*b*) Per Blackburn, J., in The Mersey Docks and Harbour Board *v.* Gibbs, 35 L. J., Ex. 225.

[1] Watkinson *v.* Laughton, 8 Johns (N. Y.), 213; Schieffelin *v.* Harvey, 6 Johns, 170; Story on Agency, §§ 314–318.

[2] Vanderbilt *v.* Richmond Turnpike Co. 2 N. Y. 479.

[3] The government itself is not liable. Seymour *v.* Van Slyck, 8 Wend. (N. Y.) 403; Keenan *v.* Southworth, 110 Mass. 474; Dunlap *v.* Munroe, 7 Cranch, 242; McMillan *v.* Eastman, 4 Mass. 378; Wiggins *v.* Hathaway, 6 Barb. 632; Hutchins *v.* Brackett, 2 Foster, 252; Schroyer *v.* Lynch, 8 Watts (Pa.) 453. A postmaster is liable for the acts of one whom he permitted to have the care and custody of the mail, in his office, not having been sworn according to law. Bishop *v.* Williamson, 11 Me. 495. See also Sawyer *v.* Corse, 17 Gratt. (Va.) 230.

Public officers are not responsible either to the government itself, or to third persons, for the misfeances or negligences, or omissions of duty of the sub-

Surveyor of highways.]—A surveyor of highways appointed by the vestry of a parish may be liable for accidents due to the condi- of such highways (*c*). Apparently the 56th section of 5 & 6 Vict. c. 50, which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, and allows it to remain there at night without proper precautions, does not apply to cases where the road itself is dangerous and not the materials (*d*).

Captain of ship of war.]—There is no analogy between the case of a captain of a ship of war and that of a master of a ship. The former has no power of appointing the officers or crew on board; and is compellable to enter upon the performance of the duties upon the ship to which he is appointed. Hence he is not answerable for damage done by his vessel running down another vessel, the damage having been done during the watch of the lieutenant, and when the captain was not upon deck, nor called by his duty to be there (*e*).

Deputies liable for misfeasance.]—In all cases deputies are answerable for their own personal misfeasances; hence a deputy postmaster is liable for non-delivery of letters gratis in a country post town (*f*). Hence it was said in an early case that as to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry letters to the post-office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own (*g*).[1]

Infringment of patent by agent.]—Agents employed to infringe a patent may, if they do so, though for the benefit of others, be liable to an action for infringement (*h*). A man, *e. g.*, mere custom-[★ 395[house agent, who has no possession of the ★ thing, and has no control over it, and no dominion or power to deal with it, to whom the safety or want of safety is not of the slightest consequence, cannot be said to be using the invention (*i*).

(*c*) Pendlebury *v.* Greenhalgh, 1 Q. B. Div. 36.
(*d*) *Ibid.*
(*e*) Nicholson *v.* Mouncey and Symes, 15 East, 384.
(*f*) Rowning *v.* Goodchild, 2 W. Bl. 909.
(*g*) Per Lord Mansfield, Whitfield *v.* Lord Le Despencer, Cowp. 754.
(*h*) Noble's Explosives Co. *v* Jones, 8 App. Ca. 5; 52 L. J., Ch. 339; 48 L. T. 490.
(*i*) *Ib.;* and see Betts *v.* Neilson, L. R., 3 Ch. 429; L. R., 5 H. of L. 1.

agents, clerks and servants so employed under them, unless, indeed, they are guilty of ordinary negligence at least, in not selecting persons of suitable skill, or in not exercising a reasonable superintendence over their acts and doings; Story on Agency, § 319. a.

[1] Ford *v.* Parker, 4 Ohio St. 576; Dox *v.* Postmaster General, 1 Peters, 318; Nowell *v.* Wright, 3 Allen (Mass.), 166; Tearney *v.* Smith, 86 Ill. 391; Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250; Fitzgerald *v.* Burrill, 106 Mass. 446; McCord *v.* High, 24 Iowa, 336.

Summary.]—The law relating to the liability of agents to third persons for tort may be thus summarized:—

1. No agents, other than masters of ships, are liable to third parties for results due to their omissions and non-performance, or the omissions of their sub-agents.
2. Every agent is personally liable to third parties for the results of his own wrong-doing.
3. Both the preceding propositions are equally true of public and private agents.
4. Ratification by the crown frees an agent from liability for wrong-doing: not so ratification by an individual (*k*).
5. Where the agent's act is within the scope of his authority, his principal also will be liable; where the act is wilful, the immediate wrong-doers alone will be liable.

(*k*) See the Chapter on Ratification.

[★ 396]

★ CHAPTER V.

RIGHTS OF AGENT AGAINST HIS PRINCIPAL.

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SECT. 1.—*Riyht of Agent to Commission.*

The contract may be express or implied.]—The right of an agent to commission or payment for his services depends upon a variety of circumstances which it will be necessary to examine in detail. This right may be derived from an express contract between the principal and agent, from a legal custom, or from an implied contract. It is part of the general law of contracts that where there is an express contract between the parties, neither can resort to an implied one inconsistent with the express one. *Expressum facit cessare tacitum* is the rule. Hence it follows that, as a general rule, where the contract between the principal and the agent is an entire contract, the latter can recover no remuneration upon a *quantum meruit*, but must recover the whole amount agreed upon or nothing (*a*). The right to recover may also be similarly controlled by custom (*b*).[1]

(*a*) See Cutter *v.* Powell, 6 T. R. 320.
(*b*) See Read *v.* Rann, 10 B. & C. 438.

[1] Where one acts as agent for two separate employers, nothing less than clear proof of the consent of both, not merely to double service, but to the double compensation, will suffice to validate an express contract with the second employer. Penna. R. R. *v.* Flanigan, 112 Pa. St. 558. See, also, as to when the agent is entitled to compensation for services. . . . . Bingaman *v.* Hickman, 115 id. 420.

See Mangum *v.* Ball, 43 Miss. 288. If the services are gratuitous the agent is not entitled to compensation; as where one on the footing of a friend, neighbor and relative, undertook to manage the moneyed affairs of an old lady,

Payment by intended legacy.]—An agent or servant who performs services on the faith of a parol promise of the employer ★ that he will make a will leaving the former a life es- [★ 397] tate in land, cannot claim a declaration that he is entitled to such estate, there being no such part performance as would take the case out of the Statute of Frauds (*c*).[1]

Circumstances under which the claim may be made.]—Turning to the circumstances under which an agent may claim commission, it will be seen that the claims may be made under any of the following circumstances:—

The authority may be duly executed.

It may be only partially executed.

It may not be executed.

It may be so executed that the agent's services are useful to the principal.

The act authorized may be illegal.

The authority may be revoked before execution—(a) by act of principal; (b) by death of principal.

The amount to which an agent is entitled will, in the absence of a contract or custom, be fixed by a jury.

Fruitless services—Authority duly executed.]—When the authority has been duly executed, the agent is entitled to his commission, unless the services performed are illegal.[2] The question whether the authority has or has not been executed is, of course, one which must be decided by a reference to the facts of each particular case. The test to be applied in such cases is supplied by asking whether the agent has performed all the services for which he was employed. If the agent has done everything he was bound to do, then it is immaterial, in the absence of a contract or custom to the contrary,

(*c*) Maddison *v.* Alderson, 8 App. Ca. 467.

without any stipulation as to compensation, and without intending to make any charge, it was held that he was not entitled, after her death to claim a remuneration for his services, and the fact that he was held to a strict account by her administrator did not vary the case. Hill *v.* Williams, 6 Jones Eq. (N. C.) 242.

To entitle a broker to commissions for services, the services must be rendered under due employment by his principal. Services rendered as a mere volunteer, without any employment, express or implied, will give no right to commissions. Hinds *v.* Henry, 36 N. J. L. 328.

[1] But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services. Martin *v.* Wright, 13 Wend. 460. Proof that the employer had obtained the services of the employee by representing to him "that it should be all right, and that he had remembered him in his will," is sufficient to show such an agreement. Bayliss *v.* Pricture, 24 Wis. 651; Robinson *v.* Raynor, 28 N. Y. 494.

[2] An agent employed to find a purchaser for certain real estate is entitled to his commission as soon as he procures the purchaser. And if the time is limited within which he is to find the purchaser he may recover his commission, though the owner of the real estate sold the same before the broker found a purchaser. Lane *v.* Albright, 59 Ind. 275; Short *v.* Millard, 69 Ill. 292.

so far as his right to commission is concerned, that his services have been fruitless, whether this result is brougut about by the conduct of his principal or by that of third parties. In the following cases, the agent was held to be entitled to recover, because he had performed all he had undertaken to do. These cases must not be confounded with the cases in which, by reason of the principal's interference, the agent is prevented from carrying out his authority.

Commission payable on orders.]—In *Lockwood* v. *Levick* (*d*), decided in 1860, the plaintiff, a commission agent, was em- [★ 398] ployed ★ by the defendant, a manufacturer, to procure orders for him upon the terms contained in a written proposition as follows:—"We expect to receive our commission on all goods bought by houses whose accounts are opened through us." The plaintiff introduced to the defendant a dealer, who gave an order for a large quantity of web. The defendant accepted the order, and undertook to execute, but for want of adequate machinery he was unable to complete, and the order was ultimately withdrawn. The plaintiff thereupon claimed the amount to which he would have been entitled if the order had been executed by defendant at the trial. The jury found that the commission was payable when the order was accepted, and that it did not depend upon whether it was executed or not A rule was subsequently granted to enter the verdict for the defendant, if the court should be ultimately of opinion that the learned judge at the trial had misconstrued the contract, or for a new trial. The rule was discharged.

Erle, C. J., said:—"It is urged on the part of the defendant that it would be unreasonable that he should be held liable to the payment of a commission upon an order which yielded him no profit. But here he had an opportunity of making profit. The plaintiff performed all the service for which he was employed, and the defendant had the option of delivering the goods and so making a profit. But I do not agree that the profit to the manufacturers is to be the criterion of the agent's right to commission." This view of the law, that the agent's rights are not affected by the loss or gain to his principal upon any transaction is strictly in accordance with equity and justice. The principal must be taken to know his own business best, and if he makes a miscalculation he has no more right to visit it upon the agent than he has upon his butcher or baker.

Sale of advowson.]—In *Lara* v. *Hill* (*e*), decided in 1863, the plaintiff was employed by the defendant to sell an advowson upon the terms that the commission should become due and payable upon the adjustment of terms between the contracting parties in every instance in which any information had been arrived at, or any particulars had been given by the plaintiff's office, notwithstanding the business might have been taken off the books subsequently. It was [★ 399] further stipulated that no ★ accommodation that might

(*d*) 8 C. B., N. S. 603.
(*e*) 15 C. B., N. S. 45.

be afforded as to time of payment or advance should retard the payment of commission. A contract of sale was arranged through the plaintiff's agency. It was duly executed, and a deposit paid on the 14th October, 1862, the residue of the purchase-money being payable on the 31st December. The court held that the plaintiff was entitled to his commission, at all events, on the 31st December, although the full purchase-money had not been then paid.

Execution of authority prevented by act of principal.]—The principal laid down by a learned author with respect to the law of commissions is, that "the whole service or duty must be performed before the right to any commission attaches, either ordinary or extraordinary; for an agent must complete the thing required of him before he is entitled to charge for it. But cases may occur in which an agent may be entitled to a remuneration for his services in proportion to what he has done, although he has not done the whole service or duty originally required. This may arise either from the known usage of the particular business, or from the entire performance being prevented by the act or neglect of the principal himself" (*f*).[1] It should be observed however, that the agent cannot recover commission when completion of the business undertaken is prevented by the act of the principal, unless that act is wrongful.

Revocation of authority to sell—Agent's right to remuneration.]—The question was very fully discussed by the Court of Common Pleas in *Simpson* v. *Lamb* (*g*), decided in 1856. This was an action by two clerical agents to recover the sum of 750*l.* for commission alleged to be due to them for negotiating (unsuccessfully) the sale of an advowson for the defendant. The defendant employed the plaintiffs to offer an advowson for sale, upon an understanding that in the event of a sale being effected through their agency, the latter should receive a commission of five per cent. upon the amount of the purchase-money. Before the plaintiffs had sold the advowson the defendant himself sold it. The former, in answer to inquiries, had informed the latter that their terms were three guineas for registering, and five per cent. upon the amount of the purchase money, payable when the contract of sale was completed. The payment of the registration ★ fee was waived. There was no [★ 400] evidence of any specific endeavours on the part of the plaintiffs to sell the advowson, or of their having incurred any expense in reference to it. At the trial, Mr. Justice Cresswell ruled that the defendant was justified in selling the living himself; that it was fair to pre-

(*f*) Story's Agency. s. 329.
(*g*) 17 C. B. 603; 25 L. J., C. P. 603.

[1] As where a broker employed to sell property at a given price and for an agreed commission, has opened a negotiation with a purchaser, and the principal, without terminating the agency or the negotiation so commenced, takes it into his own hands and concludes a sale, the broker is entitled at least to a ratable proportion of the agreed commission. Martin *v.* Silliman, 53 N. Y. 615; Briggs *v.* Boyd, 56 N. Y. 289. See Gillespie *v.* Wilder, 99 Mass. 170.

sume that the large amount of commission was taken in successful cases as a sort of compensation for the risk incurred; that the plaintiffs could not recover anything unless they sold; and that what was done by the defendant did not amount to a wrongful revocation of the plaintiffs' authority to sell. He thereupon directed a nonsuit. Chief Justice Jervis said: "I take it to be admitted that it is not competent to a principal to revoke the authority of an agent without paying for labour and expense incurred by him in the course of his employment. The right of the agent to be reimbursed depends upon the terms of the agreement. A general employment may carry with it a power of revocation on payment only of a compensation for what may have been done under it; but there may be also a qualified employment under which no payment shall be demandable, if countermanded. In the present case, I think the evidence showed that the employment was of that qualified character—like the case of the house agent or the shipbroker—the plaintiffs undertaking the business upon an understanding that they were to have nothing if they did not sell the advowson, taking the chance of the large remuneration they would have received if they had succeeded in obtaining a purchaser." And it was said by Mr. Justice Crowder: "If it could be shown that the agent is, by the wrongful act of the principal, prevented from carrying out the work on which he is employed, he would be entitled to a reasonable remuneration for what he had done." A rule *nisi* for a new trial was discharged.

Commission for procuring loan.—Refusal by lender to complete.] —*Green* v. *Lucas* (*h*) was decided in 1876. The defendant authorized the plaintiffs, who were mortgage agents, to procure for him on loan the sum of 20,000*l.* upon the security of certain leasehold property, and undertook upon their obtaining that, or any other amount agreed upon, to pay them a commission of 2*l.* per cent. upon the [★ 401] amount so procured by them, and a survey ★ fee of 10*l.* Three days before this agreement was entered into, the defendant furnished the plaintiffs with two valuations of the property, each of them setting the value at about 37,000*l.* One of them assumed that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." Relying upon these valuations, the plaintiffs applied to a society for a loan. The directors agreed to advance it, "subject to the title and all other questions proving to be satisfactory." When the lease was examined, it was discovered to contain a proviso which prevented the directors advancing the money. The plaintiffs thereupon brought their action to recover the sum of 50*l.*, and the jury found in their favour. A rule to enter the verdict for the defendant or to enter a nonsuit was discharged by the Court of Common Pleas, whose judgment was upheld by the Court of Appeal. In the court below, Lord Coleridge based his opinion upon the au-

(*h*) 31 L. T. 731; affirmed, 33 *ib.* 584; followed in Fisher *v.* Drewett, 48 L. J., Ex. 32.

thority of *Prickett* v. *Badger* (*i*) and *Green* v. *Bartlett* (*j*), holding that the defendant was liable to pay a reasonable remuneration, inasmuch as the plaintiffs had done all they were bound to do, but the negotiation had gone off in consequence of the defendants having concealed a material fact.

In the Court of Appeal the Lord Chancellor (Cairns) said:—"It appears to me that the plaintiffs had done everything which agents in this kind of work are bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contracts afterwards were to go off from the caprice of the lender, or from the infirmity in the title, it would be immaterial to the plaintiffs." His lordship also pointed out that it was immaterial, so far as the plaintiffs were concerned, whether the society was or was not justified in refusing to advance the money. The opinion expressed by Bramwell, B., and Blackburn, J., that the word "procure" in the contract meant to procure the lender and not the money, was the opinion upon which both the courts acted.[1]

Agent may be entitled to a quantum meruit.]—*Green* v. *Reed* (*k*), decided in 1862, was an action to recover 200*l.* as commission for negotiating and procuring a loan for the defendant. The plaintiff had procured an insurance company to advance 20,000*l.* on real security, and, so far as the plaintiff ★ and the company [★ 402] were concerned, the negotiation was complete. The advisers of the company, however, deemed the security invalid, and they declined to carry out the loan. The defendant eventually obtained the loan from another company. The plaintiff's case was that the commission was to be paid if the loan was procured by him. *Prickett* v. *Badger* (*l*) was cited in support of his claim. There it was held that where an agent employed for an agreed commission to sell lands at a given price, succeeds in finding a purchaser at the stipulated price, but the principal declines to sell, and rescinds the agent's authority, the agent is entitled to reasonable remuneration for his work and labour. The jury were directed that the question involved depended upon the contract. A verdict for 90*l.* was found for the plaintiff. So, in an action by an agent who had been employed to procure a loan, and had procured it, it was ruled that he was entitled to recover not necessarily the full commission, but a reasonable remuneration in case the loan was not accepted and received by his employer (*m*).[2]

(*i*) 1 C. B., N. S. 296.
(*j*) 32 L. J., C. P. 261. See Oetzmann v. Emmott, Times Law Rep., Oct. 26, 1887, p. 10.
(*k*) 3 F. & F. 226.
(*l*) 1 C. B., N. S. 296.
(*m*) Topping v. Healey, 3 F. & F. 325.

[1] Durkee v. Vermont Cent. R.R., 29 Vt. 127; Doty v. Miller, 43 Barb. 529; Love v. Miller, 53 Ind. 294; Pearson v. Mason, 120 Mass. 53; Kock v. Emmerling, 22 How. (U. S.) 69. Where, from the circumstances of the particular case an agent was not entitled to recover. See Love v. Miller, 44 Conn. 333.
[2] Turner v. Webster, 24 Kans. 38.

Evidence which entitles agent to claim commission.]—In considering whether an agent is entitled to commission for the introduction of a purchaser or capital, the question is whether the purchase or advance was the result of that introduction or of an independent negotiation between the parties. *Causa proxima* is not the question; the agent must show that some act of his was the *causa causans*. In *Tribe* v. *Taylor* (*n*) the defendant agreed to give the plaintiffs a commission of 5 per cent. on purchase-money or on capital introduced into his business. They introduced a person who advanced 10,000*l*., and who in the course of a few months entered into an agreement of partnership on making a further advance of 4,000*l*. by way of capital to the concern. Commission on the former sum was duly paid; but the court held, in an action to recover commission on the 4,000*l*., that the plaintiffs could not recover, inasmuch as the latter was not made in consequence of their negotiations (*o*).

Commission, when payable.]—Agents who effect bargains for commission are entitled to receive such commission when they have done all that they bargained to do without reference to any agreement between the other parties (*p*).[1]

[★403] ★ Where an agent is authorized to find a purchaser of property upon commission, he will be none the less entitled to the commission because he introduced the property to the agent of the buyer and not to the buyer himself (*q*).

Where agent's work is useless through want of skill.]—The principles of law applicable to claims for commission where the agent's work is useless, were laid down fully by Lord Ellenborough in *Denew* v. *Daverell* (*r*), decided in 1813. The plaintiff, an auctioneer employed by the defendant to sell for him a leasehold house, made out the conditions of sale, omitting the usual proviso that the vendor was not to be called upon to show the title of the lessor. Owing to this omission the defendant had been put to great expense, the Court of Chancery, upon a bill being filed by the vendee, holding that the vendor was bound, in the absence of the proviso, to show the title of the lessor. This he could not do, and the vendee recovered back his deposit. In the present action the auctioneer claimed 2½ per cent. commission upon the sum for which the lease was sold.

(*n*) 1 C. P. Div. 505.
(*o*) See Bayley *v.* Chadwick, 39 L. T., N. S. 429.
(*p*) Fisher *v.* Drewett, 48 L. J., Ex. 32; 39 L. T. 253.
(*q*) Wilkinson *v.* Alston, 41 L. T. 394; 48 L. J., Q. B. 853.
(*r*) 3 Camp. 451.

[1] A consignee to whom goods are sent to be sold on commission is not entitled to commissions for making the sale if he violates his instructions as to the sale. Zuhn *v.* Noedel, 113 Pa. St. 336.

A real estate broker's commissions are earned as soon as he procures a purchaser who will comply with the conditions fixed by his principal for the property proposed to be sold. Pratt *v.* Patterson's, Ex's. 112 Pa. St. 475; and an intentional concealment of important and material facts from the knowledge of his principal, will deprive him of his right to commissions, *id.*

Evidence was given that it had been the constant usage of auctioneers, when employed to sell leasehold property, to insert such a proviso in the conditions of sale. Lord Ellenborough directed the jury that, if the plaintiff's services are found to have been wholly abortive, he is entitled to recover no compensation. "By the omission," said his lordship, "the defendant has the house thrown back upon his hands, with expensive litigation. It is no answer that the particulars were shown to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If, from his ignorance or carelessness, he leads me into mischief, he cannot ask for a recompense, although, from a misplaced confidence, I followed his advice without remonstrance or suspicion." The jury found for the defendant. Lord Ellenborough said again, in *White* v. *Chapman* (*s*), decided in 1815, that where an agent was sued for money had and received for his principal, he would be entitled to deduct the amount of his commission on sales, unless it appeared ★ "that he [★ 404] had grossly misconducted himself as agent." So it was ruled by Chief Justice Best (*t*), that if the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or a compensation for his trouble. So, too, the Court of Common Pleas decided (*u*), that in considering an attorney's bill the jury were at liberty to discard an item for work entirely useless. So an auctioneer employed to sell an estate cannot claim commission if the sale becomes nugatory by reason of his default (*x*).[1]

Where the work is not altogether useless—Quantum meruit.]—If the agent's work is not entirely useless, he will be entitled to claim on a *quantum meruit* in the absence of any special contract or custom to the contrary. In *Hammond* v. *Holliday* (*y*), heard at the Guildhall, 1824, where a broker's claim for commission was disallowed, Chief Justice Best said:—"It is the broker's duty to draw up the bargain intelligibly, and if he does not, he is entitled to

(*s*) 1 Stark. 113.
(*t*) Hammond *v.* Holiday, 1 C. & P. 384.
(*u*) Shaw *v.* Arden, 9 Bing. 287.
(*x*) Denew *v.* Daverell, 3 Camp. 451.
(*y*) 1 C. & P. 384.

[1] If therefore the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskillfulness, in the business of his agency, he will not only become liable to his principal for any damages which he may sustain thereby, but he will also forfeit all his commissions. Slight negligence, or slight omissions of duty, will not indeed, ordinarily be visited with such serious consequences; although if any loss has occurred thereby to the principal, it will be followed by a proportionate diminution of the commissions. Story on Agency, § 331.

Fisher *v.* Dynes, 62 Ind. 348; Hart *v.* Ten Eyck, 2 Johns. Ch. 62, 108; Hoyt *v.* Shepherd, 70 Ill. 309; Sawyer *v.* Mayhew, 51 Me. 398.

nothing. I agree with the law laid down in the case cited (*z*). There the contract was clear and intelligible, and the broker was allowed a compensation, he having done all that he was bound to do. But has this broker done all that he was bound to do? . . . If the defendant has received advantage from the acts of the broker, then the verdict should be for the plaintiff with proportionate compensation; but if the business has been performed in so slovenly a manner that no advantage has been derived from it, then the verdict must be for the defendant." [1]

Improper charter-party obtained by broker.]—In *Dalton* v. *Irvine* (*a*), the plaintiff, a broker, was employed by a shipowner to procure a charter-party for one of the defendant's vessels. In a charter-party which was drawn up, the plaintiff inserted as terms of freight one guinea instead of five guineas per ton, whereupon the defendant refused to sign, and the bargain went off between the defendant and the intended charterer. The plaintiff had incurred expenses, and had been desired by the defendant to use all expedition in the matter. In an action brought to recover commission, with counts for money paid, work and labour, Chief Justice Tindal ruled [★ 405] that commission ★ could not be recovered, as the subject-matter out of which it was to arise, viz., freight, was never obtained, and left it to the jury to say, first, whether there was any particular contract in the case to take it out of the ordinary rule; and, secondly, whether the defendant, by desiring the plaintiff to use all expedition, induced the plaintiff to lay out the money before the usual time; and, thirdly, whether, when the charter-party was presented to him for signature, the defendant had a justifiable cause for refusing to sign it, on the ground that it was not the contract he was entitled to expect. His lordship directed them, that "in ordinary cases, if the charter-party is not carried into effect, the broker would not be entitled to recover for the incidental expenses, for they would follow the same course as the claim for the work and labour which, in such a case, has become altogether useless to the principal, and that, if the defendant was right in rescinding the contract, that would be an answer to the claim for expenses." A verdict was found for the defendant.

Solicitor's charges—Neglect to keep accounts.]—In a case where a solicitor's charges in respect of bills of costs for business done as solicitor (*b*) were disallowed, Lord Eldon decided that a confidential agent in that character, and not simply as a solicitor, is bound to keep regular accounts, and where such an agent neglected to do so, or to preserve vouchers against himself, though he had preserved those in his own favour, his lordship, on the ground of gross neglect of duty, would not allow a charge in respect of bills of costs in re-

(*z*) Haines *v.* Busk, 5 Taunt. 521.
(*a*) 4 C. & P. 289.
(*b*) White *v.* Lady Lincoln. 8 Ves. 363.

[1] *Supra.*

spect of work done as a solicitor.[1] An agent who confounds his principal's property with his own, not only will not be entitled to any commission, but will be bound to account for the whole property, except what he can prove to be his own (*c*).

Revocation of authority.]—The rules which provide that an agent is not entitled to commission, either where his authority is revoked before execution, or where the services performed are not those authorized, are both illustrated by the case of *Toppin* v. *Healey* (*d*), decided by the Common Pleas in 1863. In that case, the plaintiff was employed by the defendent to negotiate a loan on the terms that he was to be paid commission if he ★ procured the loan, [★ 406] but none if he did not. Before the plaintiff had done anything in the matter the defendant wrote to him varying the terms on which he would accept the loan. The plaintiff tried to obtain it on the latter terms. He could not succeed, but he had the offer of a loan on the terms of the first authority. This the defendant refused to accept. The court held that the plaintiff could not claim any commission, as the first authority was revoked, and as he did not procure the loan under the substituted terms.[2]

Sale by agent to company in which he is a shareholder.]—When an agent is employed to sell, he cannot sell to a company in which he is interested as a shareholder; if he does, he is not entitled to any commission from his principal in respect of the sale. Nor will the fact that the seller agrees to abide by the sale make any difference in this respect. To hold otherwise would be a departure from the general principles governing such a case, that a person cannot in the same transaction buy in the character of the principal, and at the same time charge the seller as his agent. *Salomons* v. *Pender* (*e*) is an authority upon this point. There an agent who was employed to sell land sold it to a company in which he was interested as shareholder. The court held that he was not entitled to any commission from his principal in respect of the sale, although he proved that he had no commission from the company. Baron Martin ruled at the trial that the plaintiff had become a purchaser, and could claim no commission, and this ruling was upheld by the Court of Exchequer.

Secret commission—Fiduciary relationship.]—An agent cannot claim commission upon a transaction which has been entered into in violation of his duties to his principal. In *The Etna Insurance Company*

(*c*) Lupton *v.* White, 15 Ves. 432.
(*d*) 11 W. R. 466.
(*e*) 3 H. & C. 639; 34 L. J., Ex. 95. See *infra*, p. 416.

[1] In Pennsylvania an attorney-at-law may contract with his client to render professional services for a contingent fee. Perry *v.* Dicken, 105 Pa. St. 83. Even though it is understood by both parties that the attorney is to be an indispensable witness on behalf of his client. *Id.* The relation between attorney and client ends with the death of the latter. Campbell *v.* Maples Adm., 105 Pa. St. 304.

[2] Brown *v.* Pfoor, 36 Cal. 550; Blackstone *v.* Buttermore, 53 Pa. St. 266.

(*Limited*), *Re Owens* (*f*), the facts are somewhat complicated; C. was manager and paid and confidential agent of the fire business of the European Insurance Society. This society, through C., negotiated with the Etna Company, through their paid and confidential agent O., a transfer by the latter of a branch of their business to the former for the sum of 15,000*l.* C. demanded from the Etna Company 2,000*l.*, as a commission or bonus for his services in the transaction. The Etna Company refused to grant the sum, whereupon he [★ 407] ★ contrived that the purchase-money to be paid by his employers should be 17,000*l.*, out of which the Etna Company secretly agreed to give him the 2,000*l.* On the winding-up of the latter company, O. alleged that there was an agreement between C. and himself that he should get half of the commission, and made a claim of 1,000*l.* against the latter company. This was disallowed by Vice-Chancellor Chatterton, on the ground that whatever doubt there might be to C's right to it, there could be none that O., a paid officer of the company, could not be allowed to receive anything upon such a transaction. He was, under the circumstances, bound to account to his employers for any sums he so received. Upon appeal (*g*) this decision was affirmed. "Between the claimant and the company," said Lord O'Hagan, "the relation of employer and employed, or principal and agent, clearly subsisted. His obligation was to serve them to the best of his ability. He was not at liberty to make commodity of his position, and aggrandize himself by a secret bargain detrimental to them. The principles enunciated in the case of *Tyrrell* v. *Bank of England* (*h*) are clearly applicable here, and it is the duty of the court to apply them strictly. The whole transaction is impeachable in the gravest way as a violation of the responsibility involved in the fiduciary relation which subsisted between C. and O. and the two companies." An attempt to show valuable consideration for the claim failed.[1]

Illegal contracts—Contracts not necessarily illegal.]—An agent cannot claim commission upon an illegal transaction (*i*); but this rule does not apply when the contract procured by the agent is not in itself illegal, although it may become so by the conduct of one of the parties.[2]

(*f*) Ir. R., 7 Eq. 235.
(*g*) Ir. R., 7 Eq. 424.
(*h*) 10 H. of L. C. 26.
(*i*) Josephs *v.* Peters, 3 B. & C. 639; Loonie *v.* Oldfield, 9 Q. B. 590.

[1] A. employed B. to sell land. C. agreed in writing with B. to pay him $500 "for services in assisting to negotiate a purchase" of the land. B. brought A. and C. together, and a contract was made for sale of the land. A. and C. afterwards consummated the sale themselves. It was held that B., acting for both without their consent, could not recover the $500 from C. Everhart *v.* Searle, 71 Pa. St. 256.

[2] A contract to take charge of a claim before Congress and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services"—that is to say, by personal solicitation by the agent,

In *Hainss* v. *Busk* (*k*). decided in 1814, the action was for commission for procuring freight. At the trial it appeared that the plaintiff had procured for the defendant an agreement for a charter-party for a Russian vessel called the "Amalia," of which the defendant was the correspondent. By the charter-party the defendant agreed that the ship should proceed to Charlestown, and there take in a complete cargo of permitted goods, and proceed thence to Lisbon, Cadiz, or one port of the United Kingdom, "either to be named if possible before leaving Charlestown." ★ There [★ 408] were other alternative provisions. The agreement was signed by both parties, but they afterwards differed upon the drawing up of the charter-party by a notary, and never executed it, nor did the ship ever sail on the voyage. The plaintiff then sued for his commission of 2½ per cent. on the amount of the freight. The defendant's counsel objected that the plaintiff could not recover, because the voyage contemplated was illegal by 43 Geo. 3, c. 153, which forbids the importation into England or Ireland of any production of America by ships other than British ships. The point was reserved for the court, and decided in favour of the plaintiff. "It is a very dishonest defence," said Chief Justice Gibbs, "but it must prevail if it is good in law. The ship is Russian. . . . What is the contract? That she shall proceed to Charlestown, and there take in a cargo of permitted goods. There it stops; what those goods shall be is not defined; it is left to the persons who are to load her. . . . Neither the goods to be laden, nor the port to which the ship is to go, are fixed. Is it then necessary that she must at all events make an illegal adventure? . . . If this agreement, such

(*k*) 5 Taunt. 521.

and others supposed to have personal influence in any way with members of Congress—the passage of a bill providing for the payment of the claim) is void. Such a contract is distinguishable from one for purely professional services, within which category are included, drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced. The compensation can be recovered for these when they stand by themselves, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good. Compensation can be recovered for no part. Trist *v.* Child, 21 Wal. (U. S.) 441.

Notes given to a broker to cover losses incurred in stock gambling operations are void; and if in such operations a broker advances money to pay losses incurred, he cannot recover the amount advanced, nor even the commissions for his services, as the whole transaction is unlawful. Fareira *v.* Gabell, 89 Pa. St. 89. See Painter *v.* Smith, 7 Heisk (Tenn.) 137.

But a broker may recover his commissions for services rendered, in finding a purchaser for certain goods, even though the contract of sale between the buyer and seller, made after the brokers' services were performed, was immoral and against public policy as a wager contract; nor is the question affected by the broker's knowledge of the character of the contract, he not being a party thereto. Crane *v.* Whittemore, 4 Mo. Ap. 510.

as it is, could have been legally performed by taking certain steps afterwards, the plaintiff is in that case entitled to recover a compensation for procuring the contract. *Non constabat* at the time when the plaintiff discharged his duty, that whatsoever was necessary to legalize the voyage would not be gotten." Mr. Justice Heath, replying to an argument that it was the plaintiff's duty to see that the matters requisite to legalize the adventure were complied with, asked whether it was ever said that an attorney who drew an agreement on unstamped paper, which might be stamped afterwards, was bound to see that it was stamped, and that if he omitted he was therefore not entitled to recover for drawing the agreement because it was not stamped? The present case, however, is even stronger than that put by the learned judge, for a solicitor is presumed to have a special legal knowledge, and owes duties towards his client differing in kind from those due from a broker to his principal. It has been suggested that the authority of this case has been shaken by *Holland* v. *Hall* (*l*), but there appears to be no conflict between them.

Premiums on illegal insurance.]—Premiums paid in respect of [★ 409] ★ an illegal insurance cannot be recovered back, for the whole transaction is void, and the law will not aid any of the parties (*m*).

Where the agent's right to commission depends upon a written contract, some nice questions of construction arise. Thus, where A. entered into a contract with B. to proceed to the coast of Africa, and there procure and ship for B., in England, palm oil and other produce, A. to receive as a remuneration for his services a commission of 6*l.* per cent. on the net proceeds of the dry merchantable palm oil received by B.; and the agreement further provided that A. should not be entitled to any commission on "any wet, dirty, or unmerchantable palm oil" that might be received, the court held that A. was entitled to no commission in respect of palm oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable (*n*). So, too, where by an agreement between A. and B. it was stipulated that A. should for a term receive half the profits from the sales of an article called Russian black, manufactured by him from the produce of certain quarries of B., it was held that A. was not entitled to any commission from his employer in respect of Russian black not sold as such, but used by B. in the proportion of about one-third mixed with cement and manufactured and sold by him (*o*).

Claims by unqualified practitioners.]—By the Medical Act, 1858, (21 & 22 Vict. c. 90), s. 32, no person is to be entitled to recover for medical or surgical advice, attendance, or operation, unless he is

(*l*) 1 B. & Ald. 53.
(*m*) Allkins *v.* Jupe, 2 C. P. Div. 375.
(*n*) Warde *v.* Stuart, 1 C. B., N. S. 88.
(*o*) Fullwood *v.* Akerman, 11 C. B., N. S. 737.

registered under the Act. As to apothecaries, see 55 Geo. 3, c. 194, s. 20. A practitioner, though registered, cannot give authority to an unqualified person to practise in his name without consulting him or taking his advice; nor can he sue for services rendered by the unqualified person (*p*).

Commission on net proceeds—Bad debts.]—Where a letter was addressed to the agent in the following terms, "Your commissions are 6*l.* per cent. on the net proceeds of your homeward cargo, after deducting the usual charges," the court held that the commission was payable only on the sums actually realized ★ after [★ 410] deducting bad debts and the charges (*q*). There was evidence that in ordinary mercantile language "net proceeds" meant proceeds exclusive of bad debts. Where, on the contrary, by an agreement an agent was to have a commission on sales effected or orders executed by him, the plaintiff to be responsible for bad debts, and the agent to draw his commission monthly, it was held that the agent was entitled to commission on bad debts, although by the custom of trade commission was not allowed on sales which produced bad debts (*r*).

Claim for services in addition to commission.]—A. acted under a written agreement as the commission agent of B. in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission. A. attended several times at Somerset House, where the patterns of the articles were inspected by the government officers. In an action by A. to recover for these attendances from B., Baron Rolfe ruled that if in giving these attendances A. was only acting in the discharge of his business as an agent, he could not charge for the attendances; but that if these attendances were matters beyond his duty as an agent he was entitled to be paid for them separately (*s*).

Amount of commission—Agent rejects terms offered, but does the work.]—A., a supercargo, sailed to Calabar in charge of a ship called the "Magistrate," his commission being 5 per cent. Some time after his departure the plaintiffs despatched another ship, the "Windermere," to Calabar, with instructions to A. to find a cargo for her, and "to consider her in one turn" with the "Magistrate," and offering him, in respect of this second ship, a commission of 2½ per cent. A. wrote to the plaintiffs rejecting the 2½ per cent, commission, but he proceeded to load the "Windermere" nevertheless, acting as he thought best in the interests of his employers. In an action for commission for loading the latter ship, it was ruled that he was entitled only to 2½ per cent. commission (*t*).

(*p*) Howarth *v.* Brearley, 19 Q. B. D. 303; and see Leman *v.* Houseley, L. R., 10 Q. B. 66; De la Rosa *v.* Prieto, 16 C. B., N. S. 578; Turner *v.* Reynall, 14 C. B., N. S. 328; Haffield *v.* McKenzie, 10 Ir. C. L. R. 289.

(*q*) Caine *v.* Horsfall, 1 Ex. 519; 17 L. J., Ex. 25.

(*r*) Bower *v.* Jones, 8 Bing. 65.

(*s*) Marshall *v.* Parsons, 9 C. & P. 656. See *infra*, p. 416.

(*t*) Moore *v.* Maxwell, 2 C. & K. 554.

Claim founded on custom excludes quantum meruit.]—When a claim to commission is founded upon a custom, and the custom [★ 411] ★ proved is inconsistent with the claim, no part of the claim will be allowed on a *quantum meruit*. Hence, where a ship-broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off owing to differences between the charterer and the owner, the court held that the broker could not maintain an action against the shipowner to recover a commission fixed by custom or a compensation for work and labour, the custom relied on being to the effect that the broker was entitled to receive commission from the owner on the amount of freight if the contract was perfected, but not otherwise (*u*). "Usage," said Mr. Justice Bayley, "is the legal evidence of custom, and upon the evidence it does not appear that there was any such custom as supported the plaintiff's claim. The whole rested in custom, and that failing, he was not in a situation to claim anything." To the same effect it was said by Mr. Justice Parke: "The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied." The case of *Read* v. *Rann* was decided in the King's Bench in 1830. *Broad* v. *Thomas* (*x*), a decision of the Common Pleas in the same year, was decided upon the same principle.[1]

Claim against co-owners of ship.]—The mere taking of a bill from one of several joint owners of a ship, who is also the ship's husband, is no legal release of the liability of his co-owners. Hence in an action for commission brought by shipping agents against all the co-owners of a ship, with the exception of one, D., the ship's husband, the mere fact that the plaintiffs, knowing that the defendants were co-owners of a ship with D,, took a bill from him for the amount due to them, and proved against his estate in respect of such bill, is not sufficient to discharge the defendants (*y*).

Engagements for a fixed period.]—There is a class of cases in which the agent has been engaged for a definite period at a fixed salary, with or without an additional commission, varying with the amount of business transacted by him on behalf of his principal. [★ 412] If the agent is prevented by the principal's default ★ or bankruptcy from completing his services under the agreement, the amount he will be entitled to claim must depend upon the terms of the agreement. If it fixes the amount payable upon the happening of any such an event, further calculation will not be needed, and he will be entitled to claim the sum named in the agreement (*z*). It

(*u*) Read *v.* Rann, 10 B. & C. 438. (*x*) 7 Bing. 99.
(*y*) Bottemley *v.* Nuttall, 5 C. B., N. S. 122; 28 L. J., C. P. 110; Keay *v.* Fenwick, 1 C. P. Div. 745.
(*z*) *Ex parte* Logan, L. R., 9 Eq. 149.

[1] Glenn *v.* Salter, 50 Ga. 170; Rockmare *v.* Bergholtz, 38 N. J. L. 531.

is presumed, however, that this will be the rule only when the amount named in the agreement can be taken to be the reasonable damages, and not greatly in excess of the sum to which the agent would become entitled in the event of the agreement being fully performed. If, on the other hand, the agreement makes no provision for the happening of such an event, then the agent will be entitled to the value of his salary for the full period of his engagement, subject, it may be, to certain deductions, as in *Yelland's case* (*a*). But if the agent is to be paid a commission, he may make no claim in respect of prospective commission, but will be limited to what he has actually earned (*b*).[1]

Bank manager engaged for five years—Failure of bank.]—In *Yelland's case* (*c*), 1867, Y. was engaged as manager of a bank for a term of five years, with liberty to act as agent for another company, at a salary of not less that 500*l.* a year. Before the expiration of the agreement the bank stopped payment, and Sir W. Page-wood, V.-C., held that Y. was entitled to claim the value of an annuity of 500*l.*, terminating on the day on which the agreement expired, subject to a deduction, the amount of which was calculated at chambers, by reason, first, of his having been at liberty to act as agent for another company under the agreement; and, secondly, of his freedom upon the winding-up of the bank to seek fresh employment. Where the agreement provides for the payment of a liquidated sum to the agent in the event of his being deprived or removed from his office, no deductions will be made, as in *Yelland's case* (*d*); but the whole amount named may be claimed (*e*).

Agent of liquidating company—Right to future salary.]—This decision was acted upon in 1869 by Vice-Chancellor James, in *Ex parte Clark* (*f*), although some doubts existed ★ whether [★ 413]

(*a*) *Infra.*
(*b*) *Ex parte* Maclure, *infra*,
(*c*) L. R., 4 Eq. 350.
(*d*) *Supra.*
(*e*) *Ex parte* Logan, L. R., 9 Eq. 149.
(*f*) L. R., 7 Eq. 550.

[1] Where a party enters into a contract to work for another a term of years at a specified sum per annum and is discharged by his employer before the end of the term, he has three remedies, either of which he may pursue at his election (1) He may, the moment the contract is broken, bring a special action to recover the damages arising from the breach: (2) He may treat the contract as rescinded, and immediately sue on the *quantum meruit* for the work actually performed; or (3) He may wait until the termination of the period for which he was hired and claim as damages the wages agreed to be paid by the contract. Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381. Where, under a contract of hiring for a specified period, at a fixed salary, the person employed continued to render services beyond that period, he will be entitled to compensation at the same rate, for the additional time. Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. (N. Y.) 564.

Where an agent employed at a fixed rate has imposed upon him, by the principal, additional duties and enlarged powers, without stipulating that he is to receive additional compensation, he cannot recover any extra wages for such services. Morean *v.* Dumagene, 20 La. An. 230.

the agreement in that case was not *ultra vires*. The question came before the court on an application by the liquidators of a limited trading company, that C. might be ordered to pay the sum of 1,000*l.* in respect of a call of 20*l.* per share. C. at the same time made an application under an agreement between himself and the company by which he had been appointed their agent, at a salary, for five years, in addition to commissions. It was further agreed that he should take fifty shares of 100*l.* each, and pay up at once 2*l.* per share; but the company agreed that he should not be called upon to make any further payment in respect of those shares. The call was made in respect of those shares. The company was wound up within fifteen months of the date of the agreement, and the agent's services put an end to in January, 1868. It was then agreed that 4,000*l.* was to be reserved out of the proceeds of the goods to meet C.'s claims against the company. Of this sum, 1,000*l.* was to be paid to C. on account of his claims, without prejudice; the remaining 3,000*l.* was to be deposited in the Victoria Bank in the joint names of the liquidators and C., to abide the result of proceedings in a colonial court. The Vice-Chancellor held that, independently of the agreement, the liquidators had by their conduct precluded themselves from enforcing against C. the payment of the call without bringing debts due to him into account, and that he was entitled to his full salary to the end of the five years.

Right to salary distinguished from claim to commission.]—The question raised in the two cases, so far as they relate to the agent's right to the payment of salary, was decided the same way in *Ex parte Maclure* (*g*) by the Master of the Rolls; but the Court of Appeal was asked to say that an agent might also claim for prospective commission. The agent, in addition to his salary, was to be paid a commission of ten per cent. on all business transacted. The Master of the Rolls disallowed the claim, and this decision was affirmed on appeal. Reliance was placed on the principle that if *A.* sells a man all the apples from his apple tree, he has no right to cut down that tree; if he does so, he is guilty of a breach (*h*). But, as Lord Justice James pointed out, the principle was inapplicable in the claim for commission. "That," said his lordship, "is [★ 414] essentially different from a man ★ saying, 'I am going to try and sell apples, and I will give you ten per cent. upon the profits of the sale of them.' That must, of course, depend upon the amount of apples which the man who enters into the speculation will buy, and what price he will be able to sell them at. In such a case, the other party could not say 'You are not making profits because you are going to a wrong market, and buy upon bad terms. You have not sufficient capital, and you are selling at a loss in order to get money. Therefore, I am entitled to damages for the improper mode in which you carry on your business.'"

(*g*) L. R., 5 Ch. 737.
(*h*) See McIntyre *v.* Belcher, 14 C. B., N. S. 654.

Contract to do entire work for specific sum—Contracts by seaman, builders, &c.]—Where an agent contracts to do an entire work for a specific sum, he can recover nothing unless the work is done, or unless it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract. Hence, where a sailor hired for a voyage took a promissory note from his employer for a certain sum provided he proceeded, continued, and and did his duty on board for the voyage, and before the arrival of the ship he died, it was held that no wages could be claimed either on the contract or on a *quantum meruit* (*i*). So where a seaman entered into articles of agreement to serve on board a ship bound from the port of London to the South Seas, to procure a cargo of sperm oil and to return, and was to receive a share of the profits in lieu of wages, it was stipulated in the agreement that no one of the officers or crew should be entitled to his share of the net proceeds of the cargo until the money had been received by the sellers, nor unless all stipulations had been performed under the agreement. On her voyage home the vessel was disabled and condemned in a foreign port. The cargo was transhipped, and, with the exception of a small portion sold for repairs, was delivered in London and the freight upon it paid. The seaman accompanied the cargo in the vessel to which it was transhipped, but died before it reached London; and the Court of Exchequer held that the representatives of the seaman were not entitled to his share of the proceeds of the cargo under the agreement, but only to a *quantum meruit* for his services on board the second vessel (*k*). In a later case it was stipulated by a building agreement between ★A. [★ 415] and B., that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. upon the agreement for the price agreed, and on a common count for a reasonable price according to measure and value. At the trial there was evidence that B. had resumed possession of the houses. It was held that there was no evidence to go to the jury in support of the plaintiff's claim; for that he could not recover on the special count, not having fulfilled it, and that the mere fact of B.'s taking possession of his own land on which buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works had been done or of a contract to pay for the work actually done according to measure and value (*l*). So, where the plaintiff undertook for a specific sum of money to repair and make per-

(*i*) Cutter *v.* Powell. 6 T. Rep. 320.
(*k*) Jesse *v.* Roy, 1 C. M. & R. 316.
(*l*) Munro *v.* Butt, 8 E. & B. 738.

fect a chandelier, then in a damaged state, and did repair it in part, but did not make it perfect, it was held that he could not, in an action of *assumpsit*, recover for the value of the work done and materials found (*m*).[1]

Rent collectors—Common servants.]—A case much in point was referred to by Mr. Justice Lawrence in *Cutter* v. *Powell*. Debt was brought upon a written instrument by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for his service; the plaintiff proved that the defendant's testator died three-quarters of a year after, during which time he served him, and he demanded 75*l.* for the three-quarters. Judgment having been given for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, and the court reversed the judgment (*n*). The same learned judge distinguished the case of a common hired servant, on the ground that he is considered to be hired with reference to a general understanding that a servant shall be entitled to his wages for the time he serves. [★ 416] As to cases where the subject-matter on ★ which the agent is employed is destroyed, see *Appleby* v. *Myers* (*o*).

Commission—Two-fold character of agency.]—An agent may act in a two-fold capacity, *e.g.*, he may be an agent to purchase goods and a packer of such goods, or he may be an auctioneer of an estate which he has surveyed as a surveyor. In such cases he will be entitled to make a fair charge for his services as surveyor and packer respectively, in addition to his commission (*p*). But this will not entitle him to make a secret profit out of his agency (*p*).

The relation existing between the parties may prevent the claim for commission being allowed.]—Thus, where a company which had advertised that any one introducing a client of his as a subscriber for shares should receive a commission, is being wound up, the company's solicitor and secretary will not be entitled to claim the same, even though he has expressly stipulated for it, and a resolution of the board of directors directed payment of such commission to him (*q*).

(*m*) Sinclair *v.* Bowles, 9 B. & C. 92.
(*n*) Salk. 65.
(*o*) L. R., 1 C. P. 615; in error, 2 *ib.* 651. See *supra*, p. 410.
(*p*) Per Jessel, M. R., Williamson *v.* Barbour, 37 L. T. 702. See *supra*, p. 406.
(*p*) Per Jessel, M. R., Williamson *v.* Barbour, 37 L. T. 702. See *supra*, p. 406.
(*q*) Barrow's case (No. 2), 49 L. J., Ch. 253; 42 L. T. 12.

[1] One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house nor delivered it when it is destroyed by fire, is liable to an action for money advanced upon the contract and damages for its non-performance; Tompkins *v.* Dudley, 25 N. Y. 272. If A. having agreed to work for B. for a definite period, voluntarily leaves his service without any fault on the part of B. and without his consent, before the expiration of the term, he cannot recover, either on the express contract or on a *quantum meurit* for the labor actually performed; Olmstead *v.* Beale, 19 Pick. (Mass.) 528; see also Catlin *v.* Tobias, 26 N. Y. 217; Norrington *v.* Wright, 115 U. S. 188.

SECT. 2.—*Right to be indemnified.*

The contract not within Statute of Frauds.]—A rule of law which pervades the whole law of principal and agent is that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him (*r*), provided the act is not illegal.[1] In the earlier cases, one of the defences raised by the principal when sued for such indemnity was that the promise was not in writing as required by the Statute of Frauds (*s*). Thus, in a case (*t*) decided in 1794, the plaintiff brought an action to recover from the defendant money expended on behalf of the latter. The plaintiff had, out of motives of friendship, and merely to accommodate the defendant, accepted several bills of exchange on his account. These bills had all been regularly taken up when they become payable by the defendant, except [★ 417] the last, which ★ was for 20*l.* The bill had come into the hands of G., and the defendant being unable to take it up when due, had prevailed upon G. to accept 16*l.* in part, and the plaintiff's acceptance for six guineas, the balance of the bill with interest. The latter bill was not paid when due, and G. sued the plaintiff and recovered, having been requested by the present defendant to defend. The present action was brought to recover the amount with costs. Lord Kenyon overruled an objection that the Statute of Frauds required writing, and ruled that as the defendant was personally interested, and had directed the defence to be made, the money must be taken to have been laid out by the plaintiff on the defendant's account and to his use.

Where a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him, against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal and accepted by such agent was a point raised but not decided by the Privy Council in *Hood* v. *Stallybrass, Balmer & Co.* (*u*).

Unauthorized payments by broker—Right to recover.]—The act by the performance of which the expense was made or damage sustained, must have been performed in pursuance of the authority or have been duly ratified. *Hurst* v. *Holding* (*x*), decided in 1810, was an action for money lent. The defendant, at Liverpool, requested the plaintiff to buy certain Surat cottons, upon a month's credit. The plaintiff bought them upon those terms, paying 87*l.* 12*s.* custom house duties, and sent them to Liverpool with instructions that they were to be delivered only to his order. The seller afterwards hearing many things disadvantageous to the credit of

(*r*) Taylor *v.* Stray, 2 C. B., N. S. 175.
(*s*) 29 Car. 2, c. 3.
(*t*) Howes *v.* Martin, 1 Esp. 162.
(*u*) 3 App. Ca. 362.
(*x*) 3 Taunt. 32.

[1] Wynkoop *v.* Seal, 64 Pa. St. 361; Giddings *v.* Sears, 103, Mass. 311; Howe *v.* Buffalo, N. Y. & Erie R. R., 37 N. Y. 297.

the defendant, procured the plaintiff to stop the cottons and delay them until the month's credit had expired, and to tender them to the buyer on payment of the price. The latter refused to accept them. The plaintiff had already paid the sellers. An action was thereupon brought by the broker to recover the price of the cottons paid by the plaintiff; the duties paid at the custom house; certain allowances paid to the E. I. Co., and his own commission for purchasing them. Chief Justice Mansfield ruled that he was not entitled to recover, and the jury, under his direction, found a verdict for the defendant, with liberty to move to enter a verdict for the [★ 418] ★ plaintiff for the amount of the duties paid at the custom house. A rule granted in accordance was discharged. "The plaintiff," said his lordship, "pays voluntarily for the goods, not in consequence of any direction from the defendant. So long after [the 11th of March] as the 19th of May the plaintiff himself takes the goods and sells them. . . . Having himself taken possession of the goods, what right has he to charge the commission? As for the duties, he is paid them in the increased price of the goods which he receives." In this case there could be no question that the agent had violated his duties.[1]

Auctioneer instructed to sell stranger's goods—Distinguished from case of joint tort feasors.]—One of the earliest cases in which the general principal was applied was *Adamson* v. *Jarvis* (*y*), decided in 1827, in the Common Pleas. The plaintiff was an auctioneer whom the defendant had directed to sell certain cattle by auction. The plaintiff thereupon sold them, and it turned out that they did not belong to the defendant, but to another person. The owner brought an action against the plaintiff to recover the value of the cattle sold, and having obtained judgment for the amount, the plaintiff brought the present action against the defendant for an indemnity. On behalf of the defendant it was contended that the parties were joint *tort feasors*, and that consequently the plaintiff could not recover indemnity; or at any rate the plaintiff should have required a bond of indemnity before he sold. The court, however, held that there was evidence on the facts from which the jury might say that the plaintiff, having acted on the request of the defendant, was entitled to assume that if what he did turned out to be wrongful as against a third party, he would be indemnified by the defendant. The case was determined by an application of the principal that every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have.[2]

(*y*) 4 Bing. 66.

[1] Schrack *v.* McKnight, 84 Pa. St. 26; Pickering *v.* Demeritt, 100 Mass. 416; Day *v.* Holmes, 103 Mass. 306.

[2] Where two persons are claiming title to personal property adversely to each other, and one of them calls upon a third to assist in removing it, and the as-

Claim by sheriff allowed.]—This decision of the Common Pleas was followed in 1831 by *Humphreys* v. *Pratt* (*z*), decided in the House of Lords. There the plaintiff was the sheriff to whom the defendant had given a *fi. fa.* to execute. The sheriff, acting upon the representation of the defendant, seized certain cattle,★ and [★ 419] damages were recovered against him by a third person, who claimed to be the true owner. The cattle in question were pointed out to the sheriff by the defendant as being the property of the debtor. The House of Lords held that an indemnity might be implied, but there is no record of the reasons given. The reporter remarks that he was privately informed by Lord Tenterden that his lordship put the case upon the ground that the sheriff was a public officer and was placed between two fires.

Act indemnified—Not manifestly illegal or known by agent to be tortious.]—Mr. Justice Brett, in a subsequent case (*a*), remarked that in neither these cases is it stated that the plaintiff at the time he committed the tortious act knew of any claim by a third person, nor was any such fact relied on in the judgments. The implication is not made to rest on the fact of the plaintiff's being an agent, or on notice of the third party's claim, but merely on the fact of the plaintiff having done an act at the request of the defendant, which was not manifestly illegal or tortious to his knowledge, but which exposed him to an action.

In a case (*b*), which was decided by the King's Bench in 1834, the defendant had sold ten casks of goods to A., and sent them to plaintiffs with notice that they were for A., and ordering plaintiffs to separate them from other articles sent at the same time. After they were separated, A. took away two casks; the defendant then ordered the plaintiffs not to deliver the remaining eight to A., but to another person. The order was obeyed. A. afterwards became bankrupt, and his assignee having sued the plaintiffs in trover for the eight casks, and recovered, the plaintiffs sued the defendant for the amount recovered and the costs of the action. The court held that a promise to indemnify to the full amount might be implied from the facts. "The general rule," said Lord Denman, "is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself."

Statement of the law by Tindal, C. J.]—The principles of law applicable to an agent's right to indemnity were subsequently stated in an elaborate judgment of the Court of Common Pleas delivered by Chief Justice Tindal in *Toplis* v. *Crane* (*c*), 1839. ★ The [★ 420]

(*z*) 5 Bli., N. S. 154.
(*a*) Dugdale *v.* Lovering, L. R., 10 C. P. 196.
(*b*) Betts *v.* Gibbins, 2 Ad. & El. 57.
(*c*) 5 Bing. N. C. 636.

sistant has reasonable grounds to believe that his employer is the owner of the property, a promise of indemnity to the assistant is valid in law, although it subsequently turns out that the title of the employer was not good, and the act of removal a trespass. Avery *v.* Halsey, 14 Pick. 174.

defendant was an attorney to A.; he authorized the plaintiffs, as brokers, to distrain the goods on B.'s premises for rent due to A. The distress was thereupon made. Some of the goods being privileged from distress and claimed by the owners, the plaintiffs required an indemnity. The defendant gave one on the part of A., and afterwards said he would give a further security. The owners of the goods sued and recovered against the plaintiffs, and the court held that the defendant was liable to make good the loss sustained. Having referred to the facts of the case, his lordship went on to say, "We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins* (*d*), that where an act has been done by the plaintiffs under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiffs against the consequences thereof."

Expense incurred by agent's want of skill—Incorrect estimate made by surveyor.]—An agent who executes his duties in such a manner that his services are of no use, cannot recover commission or compensation. *Moneypenny* v. *Hartland* (*e*), decided before Chief Justice Abbott in 1824, was an action by a surveyor for work and labour. The ruling of his lordship was in effect that if a surveyor employed to make an estimate is so negligent as not to inform himself, by boring or otherwise, of the nature of the soil of the foundation, and it turns out to be bad, he is not entitled to recover anything for his plans, specifications, or estimates made for the work. A nonsuit was entered. A rule to set aside the nonsuit was refused by the full court. "If a man," said Chief Justice Abbott, "employs a person to make an estimate, who tells his employer that the work will cost 10,000*l.*, and it costs 15,000*l.*, and it appears that the surveyor did not use due diligence, can it be contended that the employer is bound to pay for such information?" And Mr. Justice Bayley, referring to a claim for particular items, said: "The plaintiff's demand is for one entire account, and if from his negligence the whole of his work is worth nothing, he cannot [★ 421] recover for a particular item, as a journey, as ★ it was still part of an entire claim." The rules laid down by Chief Justice Best in *Hommond* v. *Holiday* (*f*) are as follows: "A man must complete the thing required of him before he can be entitled to charge for it. . . . If the defendant has received advantage from the acts of the broker, then the verdict should be for the plaintiff, with proportionate compensation; but if the business has been performed in so slovenly a manner that no advantage has been derived from it, then the verdict must be for the defendant." [1]

(*d*) *Supra.* (*e*) 1 C. & P. 352. (*f*) 1 C. & P. 384.

[1] In case of gross negligence the agent is not entitled to be indemnified. Godman *v.* Meixsel, 65 Ind. 32; Williams *v.* Littlefield, 12 Wend. 362.

Plans prepared for purpose of tender being made.]—Where plans and a specification for the execution of a certain work are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification. The contractor for the work cannot, therefore, sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans and specification (*g*).

Right to indemnity, implied or express—Usage to pre-pay for goods bought—Loss by fire.]—Of course it is immaterial, so far as concerns the agent's right to recover, whether his authority is express or implied. Thus, in *Sentence* v. *Hawley* (*h*), decided in 1863, the plaintiff was employed as broker on the 14th May, 1861, to buy three lots of sugar, numbered 67, 68 and 69, at a public sale, for the defendant. By the conditions of sale, the lots were to be paid for by cash on the 20th July, by acceptance at seventy days from the day of sale, or on delivery of the warrants, interest at the rate of 5*l.* per cent. per annum being allowed to the expiration of seventy-three days from the day of sale, if payment were made within twenty-one days. The plaintiff paid for the lots he bought for the defendant within the twenty-one days, and took the discount for his own benefit. He had authority from the defendant at that time to take up and pay for lot 67, but not for lots 68 and 69. On the 22nd of June, the defendant sent the plaintiff an order to get lot 68 cleared. On the day on which the order was given, and before the payment could be made and the clearing performed, a fire occurred at the warehouse where the sugars (lot 68) were stored, and they were ★ destroyed. The action was brought to [★ 422] recover the value of the lot. It was proved at the trial to be the common course for brokers, when so employed, to clear, before prompt, one of several lots of sugar in bags, bought under contract, to pay the price and obtain warrants for all the lots, the broker taking the discount under the conditions of sale. The defendant was aware of the custom, and received notice that the plaintiff had so paid the price of lots 67 and 68, and obtained the warrants. A verdict for the plaintiff was upheld by the full court. "The question is," said Chief Justice Erle, "whose was the loss? If there had been no prepayment it would have been the seller's. If the money was paid without the authority of the plaintiff, it would be the broker's. But if the broker had the authority, express or implied, of his principal for making the payment as he did, the loss must fall upon the principal. Now, knowledge on the part of the principal that it was the ordinary course of business for the broker to make the prepayment, and acquiescence by silence, seems to me to amount to a specific permission to the broker to do so." The other judges concurred.

(*g*) Thorn *v.* Mayor of London, 1 App. Ca. 120. (*h*) 13 C. B., N. S. 458.

Destruction of subject-matter of contract.]—Where the subject-matter upon which an agent has been employed for a longer or shorter period is destroyed before his contract is completed, some nice questions may be raised. In *Appleby* v. *Myers* (*i*), decided in 1867, the plaintiffs contracted with the defendant to erect upon premises in his possession a steam engine and machinery, the works being by the contract divided into ten different parts, and separate prices fixed upon each part, no time being fixed for payment. All the parts of the work were far advanced towards completion, and some of them were so nearly finished that the defendant had used them for the purposes of his business, but no one of them was absolutely complete, though a considerable portion of the necessary materials for making them so was upon the premises, when the whole premises, with the machinery and materials, were destroyed by an accidental fire. A case stated for the court raised the question whether, under the above circumstances, the plaintiffs were entitled to recover the whole or any part of the contract price. The Court [★ 423] of Common Pleas, consisting of Chief Justice ★ Erle, Justices Byles, Keating and Montague Smith, unanimously gave judgment in favour of the plaintiffs for the value of the work done. The grounds upon which this judgment was based may be thus summarized. The plaintiff cannot recover the whole contract price, for that was to be paid on the completion of the works, but they are entitled upon an implied contract to be paid the value of the work done. The principle stated by the Queen's Bench, in *Taylor* v. *Caldwell* (*k*), to the effect that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance," was not applied to the present case, because, in the opinion of the court, it fell within the qualification of the principle, the qualification being that the principle shall apply only in the absence of any express implied warranty that the thing shall exist. This qualification was recognized by the Queen's Bench in the above case. The Court of Common Pleas was of opinion that there was such an implied warranty here. The judgment was reversed in the Exchequer Chamber, consisting of Barons Martin and Bramwell, and Justices Blackburn, Shee and Lush. "The whole question," said Mr. Justice Blackburn, by whom the judgment of the court was delivered, "depends upon the true construction of the contract between the parties. We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that if by any default on the part of the defendant his premises were rendered unfit

(*i*) L. R., 1 C. P. 615; in error, 2 *ib.* 651.
(*k*) 3 B. & S. 326; 32 L. J., Q. B. 164.

to receive the work, the plaintiffs would have had the option to sue the defendant for his default, or to treat the contract as rescinded and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither.★ . . On the principles [★244] of English law laid down in *Cutter* v. *Powell*, *Munroe* v. *Butt*, *Sinclair* v. *Bowles* and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract." The judgment of the Common Pleas was reversed.[1]

No indemnity implied in trespass.]—Where a person has been induced ignorantly to commit an illegal act, an express promise of indemnity has been held to be valid (*l*);[2] but an express promise to indemnify against that which from the nature of his office he must be taken to have been conscious was against the law, is void (*m*); nor, again, is any promise implied on the part of a sheriff to indemnify an auctioneer who sells goods seized under a *fi. fa.*, when employed so to do by the sheriff's officer to whom the warrant was directed, and by the plaintiff's attorney in the original action, although the sheriff certified that he himself had seized and sold the goods, and he in fact received his poundage from the produce of the sale. Hence, when an action of trespass was brought by the owner against the auctioneer, the sheriff and others, and all the damages awarded were levied upon the auctioneer alone, he has no action for a contribution against any of his co-defendants (*n*). Lord Ellenborough appears to have been inclined to stop the last case, on the ground that there is no contribution between joint wrong-doers when judgment has been obtained against them joint-

(*l*) Fletcher *v.* Harcot, Hutt. 55.
(*m*) Martyn *v.* Blithman, 1 Yelv. 197.
(*n*) Fairbrother *v.* Ansley, 1 Camp. 343. See pp. 418–420, *supra*.

[1] The act of God will excuse the non-performance of a duty created by law but not one created by contract. The apparent exceptions to this rule, as where the performance of a contract is excused by the death of a party who was personally to perform, or the destruction of the specific subject matter of the contract, are rather cases of an implied condition as to such contingency, than of absolute contracts discharged by the act of God. So where A. had contracted to put up a building, and when nearly completed it was destroyed by lightning, he was not excused from the non-performance of the contract by such destruction of the building. School District *v.* Danchy, 25 Conn. 530. Nor is he relieved if the house be destroyed by fire. Adams *v.* Nichols, 19 Pick. 275; Fildew *v.* Besley. 42 Mich. 100; Tompkins *v.* Dudley, 25 N. Y. 272; Williams *v.* Littlefield, 12 Wend. 362.

[2] Grower *v.* Emeny, 18 Me. 79; Avery v. Halsey, 14 Pick. 174.

ly, and all the damages are levied against one of them, and that a promise to indemnify is not to be implied if one man committed a trespass at the request of another. The trial, however, was allowed to proceed, and as there was no evidence that the defendants employed the plaintiff to sell the goods in question his lordship ruled that the action was an attempt to obtain indemnification against the consequences of the agent's blunder.[1]

Right to indemnity—Pleading Rules.]—An agent against whom an action is brought may take advantage of Order XVI. r. 17, which provides that where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over [★ 425] ★ against any other person, or where from any other cause it appears to the court or a judge that a question in the action should be determined not only as between the plaintiff and the defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the court or a judge may, on notice being given to such last mentioned person, make such order as may be proper for having the question so determined. In order to entitle a defendant to serve notice on a third person under the above rule, it is not necessary that the whole question between the plaintiff, the defendant and the third person should be identical, it is sufficient if it be *primâ facie* made out that a material question in the action is also a question between the defendant and the third person; and under such circumstances the court will order service of the notice, if the plaintiff will not be prejudiced or delayed by the introduction of the third person. Hence, where an action had been brought against the defendants for breach of charter-party, by which they agreed to discharge a cargo of nitrate of soda as fast as the custom of the port of discharge would allow, and the defendants had sold at Liverpool, to a company carrying on business in Scotland, the cargo to arrive; and it was shown that by the custom of the trade, of which the company was aware, on such a sale, the buyers would be bound to discharge in accordance with the custom of the port; it was held that the defendants were entitled to an order citing the company to appear (*o*). In *Bower* v. *Hartley* (*p*), the plaintiff claimed damages for the negligence of the defendants, who were insurance brokers, in effecting a policy of insurance shipped by him abroad. The defendants had effected one of the policies through insurance brokers at Liverpool, and alleged that they claimed from the latter an indemnity in respect of such policy. An application to serve notice on the latter was disallowed on the ground that the convenience of having the question determined once for all in this action was not enough to

(*o*) The Swansea Shipping Co. *v.* Duncan, Fox & Co., 1 Q. B. Div. 644; 45 L. J., Q. B. 638.
(*p*) 1 Q. B. Div. 652.

[1] St. John *v.* St. John's Church, 15 Barb. 346; see Armstrong *v.* Toller, 11 Wheat. (U. S.) 258.

outweigh the injury to the plaintiffs which might result from the introduction of third parties.

Payment by custom of Stock Exchange.]—A broker who has been compelled by a lawful custom of the Stock exchange to ★ pay [★426] money on account of his principal has a remedy over against the latter for the sums paid (*p*); for money to meet calls (*q*).[1]

Payment of "differences" by broker.]—The question whether a broker who has been employed to speculate on the Stock Exchange can recover for "differences" against his principal or customer was, in 1878, definitely raised in the Court of Appeal in *Thacker* v. *Hardy* (*r*). The principal in that case employed the broker to effect sales and purchases, according to the rules of the Stock Exchange, for delivery on a future day, with the intention that he should not be called upon actually to deliver or accept the stock which might be sold or purchased; but only to pay or receive, as the case might be, diffierences between the price of the stock at the day of the sale and the price named for delivery. After a few months' transactions a large sum was due from the principal to the broker in respect of differences. It was contended that the latter's claim for this sum was founded on gaming and wagering transactions in respect of which no action could be brought. Lindley, J., had decided that the objection failed and that the action would lie. The Court of Appeal affirmed his decision. Bramwell, L. J., pointed out that "it is the essence of gaming that the gains shall depend upon the event." Cotton, L. J., explained that in *Grizewood* v. *Blane* (*s*), which was relied on by the defendant, both parties stood to gain or lose according to the event. In the present case there was no gambling or wagering by the broker, the contract between him and the principal was one of employment; consequently there was no answer to his claim, whether for commission or for an indemnity. From some expressions used by the Lords Justices it is doubtful whether they would have acquiesced in the decision of *Grizewood* v. *Blane*.

★ SECT. 3.—*Right to Lien.* [★ 427]

Common law and equitable lines—Possessory and non-possessory liens.]—A lien at common law is a right to retain possession of the

(*p*) Pollock *v.* Stables, 12 Q. B. 774; 17 L. J., Q. B. 354; Biederman *v.* Stone, 36 L. J., C. P. 198; Chapman *v.* Shepherd, L. R., 2 C. P. 228, Whitehead *v.* Izod, *ib.* 113. See *supra*, p. 129, and Harker *v.* Edwards, Times L. R. Nov. 23, 1887, p. 92.

(*q*) McEwan *v.* Smith, 17 L. J., Q. B. 206.

(*r*) 48 L. J., Q. B. 289.

(*s*) 11 C. B. 538.

[1] Proof that the custom of a particular place did not require purchasers of land to pay cash, though the terms of sale were for cash payment, will not sustain a contract of sale made by an agent who has violated an instruction to sell for "one third cash." Wanless *v.* McCandless 38 Iowa. 20.

The principal must conform to the particular custom or usage in the market in which his agent is acting. Bailey *v.* Bensley, 87 Ill. 556.

property of another until some claim is satisfied. Equitable liens are such as were recognized only in courts of equity. The main distinction between common law liens and other liens is, that possession is essential in the former case, but not in the latter. Another division framed upon this distinction is that which distributes liens into possessory and non-possessory. The lien of agents, as agents, is for the most part of the former kind.

Lien defined—How created.]—A lien has been defined as an obligation which, by implication of law and not by express contract, binds real or personal estate for the discharge of a debt or engagement, but does pass the property in the subject of the lien (*t*). Mr. Justice Story also insists that all liens arise by operation of law, and that where they arise by contract, express or implied, they are more properly pledges or hypothecations (*u*). On the other hand, a number of judges have declared that liens may be created by contract as well as by operation of law (*x*). It does not appear that any practical good would be attained by limiting the meaning of the word lien in the way indicated. Moreover, when it is remembered that a lien exists wherever there is a right to retain possession until some claim is paid, and that a pledge is merely one of the modes by which such a right to retain possession may be created, Mr. Justice Story's criticism loses its force. A lien confers a definite right, but it cannot be said to indicate the mode by which the right is to arise. A lien, then, may be created by express contract, or it may be implied from the usage of trade or mode of dealing between the parties, or it may arise by operation of law.

Common law lien.]—To establish a right to a common law or possessory lien certain conditions must be fulfilled:—

(1.) Possession by the claimant or his agent.

(2.) The possession must be continuous.

(3.) Possession must be acquired in good faith, and in the ordinary course of business or dealing.

[★428] ★(4.) If possession is acquired through the owner's agent, he must be acting with authority.

(5.) The claimant must obtain possession and claim lien in the same character; and conversely the owner must give possession and be indebted in the character. In other words, the claim must not be inconsistent with the terms upon which possession was obtained.

General and particular liens.]—Liens are either general or particular. A general lien is a right to retain the property of another on account of a general balance due from the owner to the person who has possession. A particular or specific lien is a right to retain the property of another for charges incurred or trouble under-

(*t*) Fisher on Mortgages, s. 149.

(*u*) Story on Agency, s. 356.

(*x*) Scarfe *v.* Morgan, 4 M. & W. 278; Smith *v.* Plummer, B. & Ald. 582; Cowell *v.* Simpson, 16 Ves. 275; Chase *v.* Westmore, 5 M. & S. 180.

gone with respect to that particular property (*y*). The former is not favoured by courts of law or equity; it can, in the absence of express contract, be claimed only as arising from dealings in a particular trade or line of business in which the existence of a general lien has been judicially proved and acknowledged, or upon express evidence being given that according to the established custom a general lien is claimed and allowed (*z*). When a general lien has been judicially ascertained and established, it becomes a part of the law merchant which the courts are bound to know and recognize (*a*). Particular liens, on the other hand, are favoured. Thus it is said, by the court in *Scarfe* v. *Morgan* (*b*): "The principle seems to be well laid down in *Bevan* v. *Waters* (*c*), that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier, by whose skill the animal is cured of a disease, or the horsebreaker, by whose skill he is rendered manageable, have liens on the chattles in respect of their charges. All such specific liens being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases." It is said in the same judgment, that whoever relies upon a general lien not recognized judicially is held to strict proof of such lien.[1]

★*First, then, as to the necessity of possession.*]—In *Wilson* [★429] v. *Balfour* (*d*), decided in 1811, certain bankers fraudulently sold out stock belonging to a customer which stood in their names, and applied the proceeds to their own use. While they remained solvent they wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name, and inclosing a memorandum, stating that they had deposited the bonds with him as a collateral security for his stock, which they promised to replace; this parcel they in fact deposited among the securities belonging to other persons who dealt with them, but gave no information of any of their circumstances to the customer till the eve of their bankruptcy, when they sent him the parcel with the bonds, saying they must stop payment next morning. It was ruled that the customer could not retain the bonds against the assignees of the bankers. "A lien," said Lord Ellenborough, "means a right to hold. But the defendant never held these bonds; he had no possession of them till the very eve of bankruptcy, when the bankrupt could not give a preference to one creditor over the other."[2]

Secondly, the possession must be continuous.]—Hence, where a

(*y*) Bevan *v.* Waters, 3 C. & P. 520.
(*z*) See per Lord Campbell, Bock *v.* Gorrissen, 30 L. J., Ch. 42.
(*a*) Brandao *v.* Barnett, 12 Cl. & F. 787.
(*b*) 4 M. & W. 283. (*c*) Moo. & Malk. 235. (*d*) 2 Camp. 579.

[1] 2 Kents Com. 634. Story on Agency § 354.
[2] Jarvis *v.* Rogers, 15 Mass. 389; Rice *v.* Austin, 17 Mass. 197; Muller *v*

person who had a lien on goods in his possession afterwards delivered them to a ship carrier, to be conveyed on account and at the risk of his principal, though unknown to the carrier, he cannot recover his lien by stopping the goods, and procuring them to be redelivered to him by virtue of a bill of lading, signed by the carrier in the course of the voyage (*e*). "The right of lien," said Lord Kenyon in that case, "has never been carried further than while the goods continue in the possession of the party claiming it." It was argued in *Kinloch* v. *Craig* (*f*), that the right of lien extended beyond the time of actual possession; but the contrary was ruled by the Court of King's Bench, and afterwards in the House of Lords, although the factor had then accepted bills on the faith of general consignments, and had paid part of the freight after the goods arrived.[1]

Thirdly, possession must be acquired in good faith, and in the ordinary course of business.]—Hence, if an individual obtains possession of a thing by misrepresentation, he cannot retain it as having a lien upon it, although he might have done so had [★ 430] ★he come by it fairly. Thus, where A., who had accepted an accommodation bill for 60*l.* for B., his former principal, obtained a cheque from C., the newly appointed agent of B., for the amount, upon the representation that there was a balance for 60*l.* due to him from B., Lord Ellenborough ruled that, in an action brought by C. to recover the amount, B. could not retain the money (*g*). So where a shipowner's factor obtained the certificate of the ship's registry from the master, upon the representation that he required it to enable him to pay the tonnage duties at the custom house, it was held that he could not retain it against the assignees of the shipowner for his general balance (*h*).[2]

Fourthly, if the possession is acquired through the owner's agent, no lien can be claimed unless the agent acted with his principal's authority, or within the scope of his apparent authority.]—Liens, it has been said, may be derived through the acts of servants or agents, acting within the scope of their employment. If a servant delivers cloth to a tailor to make his master's liveries, the tailor will have a lien on the cloth for the value of his work; but though the servant pays the tailor his charge, that will not give him a lien on

(*e*) Sweet *v.* Pym, 1 East, 4.
(*f*) 3 T. R. 119, 783.
(*g*) Madden *v.* Kempster, 1 Camp. 12.
(*h*) Burn *v.* Brown, 2 Stark. N. P. C. 272.

Pondir, 55 N. Y. 325; Burns *v.* Kyle, 56 Ga. 24. Where there is no possession there is no lien; Chaffraix *v.* Harper, 26 La. An. 22.

[1] Story on Agency, § 367.

[2] So a common carrier who has received goods from a wharfinger, with whom they have been deposited by their owner, without authority to forward them, has no lien upon them for freight against the owner. Clark *v.* Lowell & Lawrence R. R., 9 Gray (Mass.). 232; see Travis *v.* Thompson, 37 Barb. (N. Y.) 236; Tagg *v.* Bowman, 108 Pa. St. 273.

the liveries (*i*). A case, put by Gibbs, J., in *Hollis* v. *Claridge* (*k*), illustrates the principle fairly. Suppose one having a diamond offers it to another for sale for 100*l.*, and gives it him to examine, and he takes it to a jeweller, who weighs and values it; he refuses to purchase, and, being asked for it again, he says the jeweller must be first paid for the valuation; as between the jeweller and the purchaser, the jeweller has a lien; but as against the lender, he has no right to retain the jewel. The principle deduced in the marginal note from this case is, that the lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. This is not strictly accurate, since it leaves out of sight the effect of an agent's act within the scope of his apparent authority.[1]

Lastly, where a person claims a lien upon a specific chattel, the chattel must have come to him in the course of the employment in respect of which he claims the lien.]—Hence a factor can only claim a lien for his general balance upon goods which come to his ★hands as factor (*l*). So if a solicitor claims a lien [★ 431] upon deeds, they must have come to his hands in the character of a solicitor (*m*). *Dixon* v. *Stansfield* (*n*), decided in the year 1850, was an action of detinue to recover a policy of insurance. A. and Co., who carried on business at Hull as merchants, factors, ship and insurance brokers and general agents, had had various dealings as factors with B. and Co. of London. Whilst these dealings were going on between them, B. and Co. wrote to A. and Co. requesting them to get a policy of insurance effected for them on a ship for a voyage named. A. and Co. procured the insurance, and received the premiums from B. and Co. A. and Co., afterwards claimed a lien upon the policy for the general balance due to them as factors. The Court of Common Pleas gave judgment for the plaintiffs, on the ground that a man is not entitled to a lien simply because he happens to fill a character which gives him such a right, unless he has received the goods or done the act in the particular character to which the right attaches.

Lien of factor on consignment for price of goods supplied consignor.]—The question was much discussed in *Houghton* v. *Mat-*

(*i*) See per Lord Ellenborough, in Hussey v. Christie, 9 East, 433.
(*k*) 4 Taunt. 810.
(*l*) Drinkwater v. Goodwin, Cowp. 251.
(*m*) Stevenson v. Blakelock, M. & S. 535.
(*n*) 10 C. B. 398.

[1] An agent for the sale of goods cannot as against the owner, pledge or mortgage them to a third person, to secure advances made on his own account; First Nat. Bank v. Nelson, 38 Ga. 391; Benny v. Rhodes, 18 Mo. 147. But if a merchandise broker, to whom goods are delivered by his principal with power to sell, deliver and receive payment, deposit them, in the usual course of business, with a commission merchant, connected in business with a licensed auctioneer, who advances his notes thereon, the deposit binds the principal, who cannot recover the value of the goods in an action of trover; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386.

thews (*o*), decided in the year 1803. This was an action in trover for a quantity of indigo, brought by the assignees of a bankrupt principal against his factor. The factor had sold goods of B. in his own name to the bankrupt. The latter, without paying for these goods, sent the indigo in question to the factor for sale, and afterwards became bankrupt. He had never employed the factor before. Upon his assignees making a claim to the indigo which still remained unsold, the factor set up a lien for the balance of the price of the former goods sold before the relation of factor and principal existed between himself and the bankrupt. The consignees tendered the charges with respect to the indigo. At the trial, before Rooke, J., a verdict was found for the plaintiff, leave being reserved to the defendants to move to set that verdict aside and enter a nonsuit. A majority of the court, Chambre, Rooke and Heath, JJ., upheld the verdict, Lord Alvanley dissenting. The form taken by the question in this case was—whether, when an agent receives goods to sell for A., he is entitled to retain them, though unsold, after a tender of all [★ 432] ★ charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for B. to A. under a general authority from B. to sell, there being no general balance due from A. to the broker, and the broker not having sold the goods of B. under a *del credere* commission. This rather involved question was answered in the negative by a majority of the judges.

Deposit inconsistent with lien.]—The rule that the claim to lien must be consistent with the terms upon which possession was obtained is well established. If a debtor deposits goods or chattels with a creditor for a special purpose, or upon an understanding inconsistent with a claim to lien, the latter, by accepting the goods or chattels for that purpose, or upon that understanding, waives any right to lien which he might otherwise have. This is merely another application of the maxim, "*Expressum facit cessare tacitum.*" Hence, if securities are deposited in a box with a banker for safe keeping only (*p*), or if placed in his hands to receive the interest on them (*q*), no lien can be claimed.[1]

Lien and personal remedies co-exist.]—A claim to a lien is not a waiver of personal remedies against the debtor. Hence, where a factor makes advances he has a personal remedy against the principal, as well as a lien on the funds in his hands; and this is the same whether the factor has or has not a *del credere* commission, except that where the factor having a *del credere* commission has sold the goods, he cannot sue the principal for advances which are covered by

(*o*) 3 B. & P. 485.
(*p*) Leese *v.* Martin, L. R., 17 Eq. 224.
(*q*) Brandao *v.* Barnett, 12 Cl. & F. 787.

[1] And an agreement by a mechanic to look to the personal credit of his debtor will discharge his lien for work done by him. Bailey *v.* Adams, 14 Wend. (N. Y.), 201.

the price of the goods, that price being warranted to the principal by the guarantee arising of the commission (*r*).[1]

Lien and mortgage under Companies Act distinguished.]—For a distinction between a claim to a lien by an agent and a mortgage, under the 43rd section of the Companies Act, 1862, reference may be made to *In re Pavy's Patent Felted Fabric Co.* (*s*).

Innkeeper's lien.]—An innkeeper has a lien upon his guest's horses and carriages, as well as upon his guest's personal luggage, for the whole of his bill for the guest's entertainment, and not merely for the keep and care of the horses and carriages;[2] but if ★ be- [★ 433] fore the passing of 41 & 42 Vict. c. 38, he sold the goods, he was guilty of a conversion, for which the owner of the goods could maintain an action against him, and recover the whole of the proceeds of the sale as damages (*t*).

Equitable liens for advances.]—As to the equitable lien of agents for advances made, see *Rutscher* v. *Comptoir d' Escompte de Paris* (*u*), *Chinnock* v. *Sainsbury* (*v*), *Deane* v. *Byrnes* (*x*), and *Bristowe* v. *Whitmore* (*y*).

SECT. 4.—*Liens of particular Classes of Agents.*

First, as to the lien of auctioneers.]—An auctioneer has a special property in the goods sold by him and a lien on goods in his possession, or on the proceeds thereof, for his commission and expenses. He may retain his commission and expenses out of any deposit or sale proceeds which have been paid to him on account of his principal (*z*).[3]

If, by reason of a defect in the title, the auctioneer is compelled to repay the deposit, his action is against the vendor (*a*).

Secondly, as to bankers.]—Bankers have a general lien upon all notes, bills, and other securities deposited with them by their customers, for the balance due to them upon the general account (*b*).[4]

(*r*) Graham *v.* Ackroyd. 10 Ha. 192.
(*s*) L. R., 1 Ch. Div. 631.
(*t*) Mulliner *v.* Florence, 1878, 3 Ch. D. 484; 38 L. T. 167.
(*u*) 34 L. V. 798.
(*v*) 6 Jur., N. S. 1318.
(*x*) 13 W. R. 299.
(*y*) 9 H. of L. Ca. 391.
(*z*) Drinkwater *v.* Goodwin, Cowp. 251; Hammond *v.* Barclay, 2 East, 227; Story, Agency, s. 27.
(*a*) See Spurrier *v.* Elderton, 5 Esp. 1.
(*b*) Paley, by Lloyd, 131; Story, Agency, s. 380; Bolland *v.* Bygrave, Ry. & Moo. 271.

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[1] The factor gives a joint credit to the fund and the person of his principal; yet, from the nature of the contract, resort must first be had to the fund, if it can be made available. Coolies *v.* Cumming, 6 Cow. (N. Y.), 181; Strong *v.* Stewart, 9 Heisk. (Tenn.), 137; Dolan *v.* Thompson, 126 Mass. 183.

[2] 2 Kents Com. 634, ns. (d) and y[1], 642, (13th. ed.)

[3] Beller *v.* Block, 19 Ark. 566; Hulse *v.* Young, 16 Johns. 1; Laussatt *v.* Lippincott, 6 S. & R. (Pa.) 386; Thompson *v.* Kelly, 101 Mass. 291.

[4] Bank of Metropolis *v.* New England Bank, 1 How. (U. S.) 234; Case *v.* Bank, 100 U. S. 446.

A banker does not lose his lien because he happens to act for his customer in another capacity, *e. g*, as regimental agent (*c*).

Thirdly, as to brokers.]—Brokers do not, as brokers, possess a general lien.[1] Insurance brokers are an exception to this rule, inasmuch as a custom exists to intrust them with the possession of policies of insurance effected by them (*d*).[2]

As to insurance brokers in the city of London, see *Hewison* v. *Guthrie* (*e*).

[★ 434] ★ In *Jones* v. *Peppercorne* (*f*), a number of bonds payable to bearer had been deposited with bankers for safe custody. The bankers fraudulently deposited them with their brokers for the purpose of raising money upon them. The brokers accordingly raised money upon them, and it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers; and not merely for the advances made on the security of these particular bonds.

Crawshay v. *Homfray* (*g*), *Kirchner* v. *Venus* (*h*), proceed upon the principle that a lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether that contract is express or implied from a certain course of dealing. But where a broker has merely agreed to state monthly accounts, and to receive monthly payments, and has never delivered up the policies until after actual payments made to him, his right of lien is not superseded in any way by the special arrangement (*i*).

The lien of a broker upon policies of insurance which he has effected, and on which he has paid the premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. This principle has been settled by a series of authorities. One of the earliest in which the principle was mentioned was the case of *Chase* v. *Westmore* (*j*), which was decided in 1816 by Lord Ellenborough. In delivering judgment, his lordship expressed an opinion that where the parties contract for a particular time or mode of pay-

(*c*) Roxburghe *v.* Cox, L. R., 17 Ch. D. 529; 50 L. J., Ch. 773; 45 L. T. 225.
(*d*) See Phillips on Insurance, vol. 2, p. 575; Snook *v.* Davidson, 2 Camp. 218.
(*e*) 3 Scott, 298.
(*f*) 28 L. J., Ch. 153.
(*g*) 4 B. & A. 50.
(*h*) 12 Moo. P. C. 361.
(*i*) Fisher *v.* Smith, 4 App. Ca. 1; 48 L. J., Q. B. 411.
(*j*) 5 M. & S. 180.

[1] A broker may have under certain circumstances a particular lien. As where a cargo of sugar was sold through a broker, but before it was all delivered, the principal failed. The broker was then authorized to deliver the balance of the cargo and draw for the proceeds. Upon the receipt of the money, they were entitled to a lien on it for the amount of brokerage due them for effecting a sale of that particular cargo. Barry *v.* Boninger, 46 Md. 59. See, also, Corbett *v.* Underwood, 83 Ill. 324.

[2] Spring *v.* So. Car. Ins. Co., 8 Wheat. (U. S.) 268; Cranston *v.* Phila. Ins. Co., 5 Bin. (Pa.) 538; Moody *v.* Webster, 3 Pick. 424.

ment, the workman has not a right to set up a claim to possession inconsistent with the terms of the contract. The principle is now well established (*k*). It was stated in the following terms by Lord Selborne in a case, *Fisher* v. *Smith* (*l*), which was determined in the year 1878:—"A lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether that contract is express or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse ★ to deliver them (the proper time [★ 435] having arrived) upon the ground of any lien for a price, which by agreement was not then payable." In the case last quoted, the House of Lords held that where the agent or broker has merely agreed to state monthly accounts, and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded in any way by this special arrangement, even though the broker has effected the policies through an intermediary, whom he knew to be an intermediary, and not the principal, and who has received payment from the principal, but who has not paid the broker.

Fourthly, as to factors.]—Factors have a general lien for the balance of the account (*m*).[1]

An agent who is intrusted with the possession of goods for the purpose of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price, and to sell in a particular name (*n*).

As to the lien of an agent employed to sell goods and to accept bills against them, see *In re Pavy's Patent Felted Fabric Co.* (*o*).

Fifthly, as to common carriers.]—A common carrier has a particular or specific lien at common law which empowers him to retain goods carried by him until the price of the carriage of those particular goods had been paid (*p*). A claim to a general lien can be supported only by proof of general usage, special agreement, or mode of dealing supporting such claim (*q*). Where goods are consigned to an individual, or to his order, the carrier has a right to consider him as the owner of the goods for the purpose of deliver,

(*k*) See Kirchner *v.* Venus, 12 Moo. P. C. 361; Crawshay *v.* Homfray, 4 B. & A. 50; and Bock *v.* Gorrissen, 2 D. F. & J. 434.

(*l*) 4 App. Ca. p. 12.

(*m*) Kruger *v.* Wilcox, Amb. 252.

(*n*) Stevens *v.* Biller, 25 Ch. D. 31; and see *Ex parte* Dixon, 4 Ch. Div. 133.

(*o*) 1 Ch. Div. 631. See *supra*, p. 430.

(*p*) Butler *v.* Woolcott, 2 N. R. 64.

(*q*) Rushforth *v.* Hadfield, 6 East, 519; S. C., 7 East, 224; Wright *v.* Snell, 5 B. & Ald. 350.

[1] See Johnson *v.* The Hoosier Drill Co. 99 Pa. St. 216; Bryce *v.* Brooks, 26 Wend. 367; Hidden *v.* Waldo, 55 N. Y. 294; Daniel *v.* Swift 54 Ga. 113. See Chaiffraix *v.* Harper, 26 La. An. 22.

but not for the collateral purpose of creating a lien on the goods as against the owner in respect of a general balance due from the consignee. Hence, where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners, and goods were sent to the order of a factor, the court held that the carrier had not, as against the real owner, any lien for the balance due from the factor (*r*).[1]

[★ 436] ★ *Consignors and carriers—Debt of consignee.*]—Questions may arise between consignors and carriers wherein the latter, upon the exercise of the right of stoppage *in transitu*, claim to retain the goods until a debt due to them from the consignee has been discharged. It was for some time doubted whether the exercise of the right of stoppage *in transitu*, which appears to have been first recognized in the year 1690 (*s*), could affect the rights of third parties. The point was definitely raised in *Oppenheim* v. *Russell* (*t*), which was decided in the year 1802. In that case the Court of Common Pleas decided that a usage for carriers to retain goods for a general balance of account between them and the consignees cannot affect the right of the consignors to stop the goods *in transitu*. Mr. Justice Heath based his opinion upon the following grounds; First, the right of stopping *in transitu* is a common law right; secondly, it is a right arising out of the ancient power and dominion of the consignor over his property, and reserved to him upon his delivery of the goods to the carrier; and, thirdly, there is privity of contract between the consignor and the carrier. His Lordship was clear that this power, reserved out of the dominion the consignor had over his property, is paramount to any sort of agreement as between the carrier and consignee. The court agreed unanimously in deciding that a carrier has no absolute right in the property intrusted to him, and that while the goods are *in transitu* his lien cannot, as against the consignor, extend any further than to entitle him to be paid for his carriage of the particular goods.

Consignee and carrier.]—Similarly questions may arise between the consignee and the carrier; but it has been decided that a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor (*u*).

Sixthly, as to the master of a ship.]—The master of a ship has a maritime lien both for his wages and disbursements, and his claim is to be preferred to the claim of a mortgagee (*x*), or to that of a

(*r*) Wright *v.* Snell, *supra*.
(*s*) Wiseman *v.* Vanderput, 2 Vern. 203.
(*t*) 3 Bos. & P. 42.
(*u*) Butler *v.* Woolcott, 2 N. P. 64.
(*x*) The Mary Ann, L. R., 1 A. & E. 8; 24 Vict. c. 10, s. 10.

[1] Story on Agency § 382. 2 Kents Com. 637, 638.

purchaser (*y*). A master has a maritime lien for ★ disbursements, which attaches to the ship in the hands of *bonâ fide* purchasers without notice of the lien (*z*). A liability incurred is to be considered as a disbursement within the Admiralty Court Act, 1861, s. 10 (*a*); but the maritime lien for damages arising out of damage done by a foreign vessel in a collision for which she is to blame takes precedence of the maritime lien of the seamen for wages earned by them since the collision on board such vessel (*b*). Formerly the master had no lien upon the ship for his wages (*c*). By the 16th section of the 7 & 8 Vict. c. 112, he first acquired the same rights of lien for the recovery of his wages as a seaman, but only in the case of a bankruptcy of the owner; but this restriction was taken off by the 191st section of the Merchant Shipping Act, 1854, which enacts, that "every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages." The seaman, however, could not recover wages in the Admiralty Court if there was a special contract respecting the same; and as the master's wages are almost invariably determined by special contract, his position was not greatly improved by the Merchant Shipping Act. This difficulty was put an end to by the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 1), which enacts, that "The High Court of Admiralty shall have jurisdiction over any claims by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any lien by the master of any ship for wages earned by him on board the ship." The claim of a seaman for his wages overrides that of a mortgagee; hence the claim of the master in respect of his wages is also preferred to that of a mortgagee (*d*). [★ 437]

Maritime lien on freight—Possession not necessary—The lien explained.]—The master's maritime lien on the freight for his wages and disbursements, in priority to the claims of the mortgagees, is not affected by the fact of his being also part-owner of the vessel (*e*). A maritime lien does not include or require possession. The word is used in maritime law, not in the strict ★ legal sense in which we understand it in courts of common law, in which case there can be no lien where there is no possession actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This, it has been said, was well understood in the civil law, by which there might be [★ 438]

(*y*) The Ringdove, 55 L. J., P. D. & A. 56.
(*z*) The Fairport, 52 L. J., P. D. & A. 21.
(*a*) *Ibid.*
(*b*) The Elin, 8 P. Div. 129.
(*c*) Smith *v.* Plummer, 1 B. & Ad. 575.
(*d*) Per Dr. Lushington, The Mary Ann, *ubi sup.*
(*e*) The Feronia, L. R., 2 A. & E. 65.

a pledge with possession, and a hypothec without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of law, a maritime lien is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process. That process is explained by Mr. Justice Story (*f*) to be a proceeding *in rem*. "A maritime lien," in the language of the judicial committee of the Privy Council in *Harmer* v. *Bell* (*g*), "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that, where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." Maritime liens are to be distinguished from claims the payment of which the court has power to enforce from the ship and freight. The former spring into existence the moment the circumstances give birth to them, such as damage, salvage and wages. But it does not follow that because a claim may, by act of parliament, be enforceable against the respondent, that it is therefore created a maritime lien (*h*).

Lien for extraordinary expenditure incurred to save cargo.]—A question of some novelty was raised in *Hingston* v. *Wendt* (*i*), which was decided in 1876, viz., whether a ship captain and his agent, who made an extraordinary expenditure for the purpose of saving a cargo, and which did save the cargo, had a right to detain the [★ 439] whole of the cargo, if it belonged to one owner, till★ the whole was paid or secured; or, if the cargo belonged to several owners, to detain each part of the goods so saved till the contribution in respect of that part was paid or secured. The court answered this question in the affirmative, although the charges were incurred without express authority from the owner.

Seventhly, as to solicitors—Kinds of lien.]—A solicitor has two kinds of lien:

(1) A retaining lien, which is a right to retain possession of another's property until a debt due to the solicitor has been satisfied.

(2) A charging lien, which is a right to charge property in the possession of another.

Liens are also divided into particular and general.]—A particular

(*f*) 1 Sumner, 78.
(*g*) 7 Moo. P. C. 284.
(*h*) The Mary Ann, L. R. 1 A. & E. 11.
(*i*) 1 Q. B. Div. 367.

lien exists when the claim arises in respect of the very property retained. A general lien exists where the debt results from a general balance of account. The retaining lien is both particular and general; whilst the charging lien is only particular (*j*). A retaining lien is defeasible; a charging lien is absolute (*k*). The lien of a town agent is general as against the country solicitor, but particular only as against the latter's client (*l*).

To what the right attaches]—The retaining lien of a solicitor attaches to all deeds, papers, money,[1] and chattels in his possession, belonging to his client, and which have come to his hands in the course of, and with reference, to his professional employment, unless there has been some agreement to the contrary, or unless the right is inconsistent with the solicitor's employment (*m*). Thus, the right has been held to attach to account books, ledgers, journals and cash books (*n*); letters patent (*o*); papers relating to a manor (*p*); articles delivered to the solicitor for the purpose of being exhibited to witnesses on the trial of an action (*q*); bills of exchange (*r*); an award (*s*); money received by way of compromise (*t*). "If the money," said Lord Mansfield, in *Welsh* v. *Hole* (*u*), "come to his hands, ★ he may retain to the amount of his bill. He [★ 440] may stop it *in transitu* if he can lay hold of it." The papers, &c. must be received by the solicitor in his professional character.[2] Hence there was no lien recognized in the following cases: where the deeds came to him as mortgagee (*x*); where the work was done in character of town clerk (*y*); when a deed was delivered to the solicitor for the purpose of being shown to another by way of satisfaction (*z*); where A. gave deeds to B. for the purpose of satisfying himself of their sufficiency to secure an annuity, and B. gave them to C. for the purpose of investigating the title, and the treaty

(*j*) Stokes on Liens, p. 1; Lush, Practice, vol. i. 323; Chitty, Pract. vol. i. 133.
(*k*) *Ibid.*
(*l*) Lawrence *v.* Fletcher, 12 Ch. D. 853.
(*m*) Chitty, Pract., vol. i. 133; Lush, vol. i. 323.
(*n*) *Ex parte* Jabet, 6 Jur., N. S. 387.
(*o*) *Ex parte* Solomon, 1 Glyn & J. 25.
(*p*) Reg. *v.* Williams, 2 H. & W. 277.
(*q*) Friswell *v.* King, 15 Sim. 191.
(*r*) Gibson *v.* May, 4 D., M. & G. 512.
(*s*) Jones *v.* Turnball, 5 Dow, 591.
(*t*) Davies *v.* Lowndes, 3 C. & B. 823.
(*u*) Doug. 238.
(*x*) Pelly *v.* Wathen, 18 L. J., Ch. 281.
(*y*) Rex *v.* Sankey, 5 A. & E. 423.
(*z*) Balch *v.* Symes, 1 T. & R. 87.

[1] See Shoemaker *v.* Stiles, 102 Pa. St. 549.

[2] St. John *v.* Diefendorf, 12 Wend. 261; Dennett *v.* Cutts 11 N. H. 163; Stewart *v.* Flowers, 44 Miss. 513; Howard *v.* Osceola, 22 Wis. 453; Ocean Ins. Co. *v.* Rider, 22 Pick. 210; Robinson *v.* Haws, 56 Mich. 135.

See Walton *v.* Dickerson, 7 Pa. St. 376. But in New York *contra*. *In re* Knapp 85 N. Y. 284. The same in Indiana. Mut. Life Ins. Co. *v.* Buchanan, 100 Ind. 63, and Vermont; Hurlbert *v.* Bingham, 56 Vt. 368.

for the annuity went off, not from any objection to the title—the court refused to allow C. to retain them until the cost of investigating the title was defrayed (*a*); where a solicitor in a cause in chancery had without the authority of that court received rents (*b*).

The lien must not be inconsistent with the solicitor's employment.]—Hence the lien does not attach to an original will given to him to be proved (*c*); or to money placed in the hands of the solicitor for a specific purpose (*d*).[1]

Enactment as to charging liens.]—In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and he shall thereupon have a claim upon and a right to payment out of the property of whatsoever nature, tenure, or kind it may be, for the taxed costs, charges and expenses of, or in reference to, such suit, matter, or proceeding (*e*). The court or judge may also make such order for taxation and for payment of such costs as shall appear just and proper, but no order shall be made where the right to recover payment is barred by the Statute of Limitations. An order declaring a solicitor entitled to a charge under this section must be made in the branch of the court to which the suit was attached (*f*). All conveyances and acts done to defeat this [★ 441] right are, unless made ★ to a *bonâ fide* purchaser for value without notice, absolutely void and of no effect as against the right of the solicitor (*f*).[2]

(*a*) Hollis *v.* Claridge, 4 Taunt. 807; see Ridgway *v.* Lee, 25 L. J., Ch. 584.
(*b*) Wickens *v.* Townshend, 1 R. & My. 361.
(*c*) Georges *v.* Georges, 18 Ves. 294.
(*d*) *Re* Callen, 27 Beav. 51.
(*e*) 23 & 24 Vict. c. 127, s. 28.
(*f*) Heinrich *v.* Sutton, L. R., 6 Ch. 865.

[1] An attorney has no lien except upon such papers of his client as have come into his hands for the purpose of business, in the ordinary course of his professional employment. He has no lien upon a negotiable bond placed in his hands to be held by him in trust for another. Henry *v.* Fowler, 3 Dal. (N. Y.) 199.

[2] In Pennsylvania an attorney has a lien for his services only upon a fund or upon papers which he actually has in his possession. But where a fund is brought into a Court of Equity by the services of an attorney, who looks to that alone for compensation, though his interest is not of the nature of a lien, he is the equitable owner thereof to the extent of the value of his services, and the Court administering the fund will intervene for his protection, and award him a reasonable compensation therefrom. McKelvy's & Sterrett's Appeals, 108 Pa. St. 615.

Charging liens:—The rules upon this subject vary in the different States. In some they are governed by statute; as in Maine, Potter *v.* Mayo, 3 Me. 34; the same in Massachusetts, Baker *v.* Cook, 11 Mass. 236, and in Kentucky, Wood *v.* Anders, 5 Bush (Ky.), 601. In some others the lien does not exist at all. Dubois' Appeal, 38 Pa. St. 231; Hill *v.* Brinkley, 10 Ind. 102; Frissell *v.* Haile, 18 Mo. 18.

The charge limited to property of client.]—The charge for costs extends to the property of the client only, and not to that of other persons. An estate was settled on A. for life, with remainder to his children as he should appoint, and in default of appointment to the use of his children as tenants in common in tail, with cross remainder and in tail between them. In a suit to which B. was a defendant, an appointment by A. was set aside, and the property was left to devolve according to the limitations of settlements, and B. thereby became entitled to an estate tail in certain undivided shares of the property. B. died a bachelor and without having executed a disentailing deed. B.'s solicitor was not allowed to charge B.'s shares of the settled property with costs, under the above section (*g*).

Where a solicitor has a lien for costs on a policy of assurance, it is not necessary for him to give notice of it to the insurance company in order to preserve his lien against subsequent mortgages of the policy who give such notice (*h*).

Where the town agent of a country solicitor receives money in an action in which the client of the latter is plaintiff, the court will, in the exercise of its summary jurisdiction, order the former to pay

(*g*) Berrie v. Howitt, L. R., 9 Eq. 1.
(*h*) West of England Bank *v.* Batchelor, 46 L. T. 132.

An attorney has no such lien in a cause before judgment as to prevent his client from settling the action with the opposite party without his consent or knowledge. Simmons *v.* Almy, 103 Mass. 33; Henchy *v.* City of Chicago, 41 Ill. 436; Hobson *v.* Watson, 34 Me. 20. Where an attorney is prosecuting an action for a client, and the client assigns his interest in the subject matter to a third person, the consideration being an antecedent debt, the assignee, even though the assignment were made before judgment, takes subject to the rights of the attorney. He has a lien upon the proceeds of the judgment recovered in the action, not only for his services therein, but also for his general account for professional services rendered to the assignor. McCain *v.* Portis, 42 Ark. 402; Schwartv *v.* Jenny, 21 Hun. (N. Y.) 33.

Where the cause of action is not assignable a client cannot, by an agreement before judgment or a verdict thereon, give an attorney any interest therein or in the costs which would be incident to a recovery, which will survive the settlement of the cause of action. This was so held in an action for personal injuries. The client had agreed with his attorneys to pay all his own costs and save them from any court costs, to give them one-half of the damages recovered and all of the taxable attorney's fees, and not to discontinue or settle the action without their consent, and where the defendant in the action, with knowledge of such agreement and against the protests of such attorneys paid to the plaintiff personally a sum of money in settlement of the suit and procured from him a release and discontinuance of the action. Kusterer *v.* City of Beaver Dam, 56 Wis. 471.

An attorney, who has recovered land for his client, in an action of ejectment, has no lien thereon for his fee. Humphrey *v.* Browning, 46 Ill. 476; Martin *v.* Harrington, 57 Miss. 208; McCullough *v.* Flowmoy, 69 Ala. 189.

In some States an attorney's lien in limited. Wells *v.* Hatch, 43 N. H. 246; Forsyth *v.* Beveridge, 52 Ill. 268.

In others it extends to his costs and charges is the suit and any other sum due him from the owner for other professional business. Savings Bank *v.* Todd, 52 N. Y. 489; Stratton *v.* Hussey, 62 Me. 286.

over the money to the client, notwithstanding that he claims to retain it for a debt due to him from the country solicitor (*i*).

Charging liens have been allowed in the following cases:

1. A., the defendant, having recovered a sum of money in an action brought by him against D., C., his attorney in that action, had taken out a summons for an order charging his costs in the action upon the sum recovered. B. afterwards, having recovered judgment in his action against A., obtained an *ex parte* garnishee order attaching the sum recovered by A. against D. in execution. C.'s claim was held to be good as against B. (*k*).
2. In a suit by a *cestui que trust* against a lien of landed estate a [★442] receiver was ordered to be appointed. During the ★ progress of the cause the plaintiff, without the knowledge of her solicitor, agreed with the defendant to compromise the suit. Upon hearing of this, the plaintiff's solicitor applied for the terms of the compromise; they were refused him. The court held, upon his petition, that he was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the plaintiff (*l*).
3. The costs of a married woman incurred by her in the defence to a suit by her husband to set aside a first nuptial settlement, whereby funds were assigned to trustees to secure an annuity to her separate use without power of anticipation, were charged on the annuity (*m*).
4. A foreign vessel was arrested in an admiralty suit. A solicitor was instructed to defend; the suit was dismissed with costs. Suits were again instituted against the vessel and freight for necessaries, some of which were supplied subsequently to the former suit. The vessel was sold, and the proceeds paid into court. The solicitors who defended the former suit were paid out of the proceeds in priority both to the claims in respect of necessaries supplied after the institution of the first suit, as well as to the master's claim for wages (*n*).
5. S. and D. were entitled to a portion of certain real estates, subject to mortgages thereon. S. was entitled to a charge on the other portion of the same estate. S. filed a bill for foreclosure and redemption, to which D. was a defendant. A decree was made in favour of D. Before the general certificate in the suit was made, D. became bankrupt, and his solicitor was held entitled to a charge on his estate and interest (*o*).

(*i*) *Ex parte* Edwards, 7 Q. B. Div. 155, distinguishing Robbins *v.* Fennell, 11 Q. B. 248.
(*k*) Birchall *v.* Pugin, L. R., 10 C. P. 397.
(*l*) Twynam *v.* Porter, L. R., 11 Eq. 181. (*m*) *Re* Keane, L. R., 12 Eq. 115.
(*n*) The Heinrich, L. R., 3 A. & E. 505; see The Leader, L. R., 2 A. & E. 314; The Phillippine, L. R., 1 *ib.* 309.
(*o*) Scholefield *v.* Lockwood, L R., 7 Eq. 83.

6. Where the proceedings were under the Declaration of Titles Act on behalf of the infant (*p*).
7. In a partition suit (*p*).
8. In a suit to obtain a declaration of lien (*q*).
★ 9. By an order in an administration suit the costs [★ 443] were ordered to be taxed and the plaintiff's costs to be paid to his solicitor B., out of a specified fund in court. Before the costs had been taxed the plaintiff obtained an order to change his solicitor, and B. no longer acted for any party in the suit. The Court of Appeal held that B. was entitled to a charging order, under 23 & 24 Vict. c. 127, upon the interest of his client in the funds in court, notwithstanding the prior order for payment out of a certain specified fund; but that such order ought not to extend to directing a sale, but should be limited to the parties' liberty to apply. The fact that the plaintiff had in the meantime assigned his interest with the knowledge of B. was held to be immaterial (*r*). B. was allowed to retain the papers in the suit till his costs were paid. In another case a solicitor had been originally employed by H. to take proceedings in respect of certain shares in a company of which he was a director. In consequence of those proceedings the solicitor obtained certain cheques from the liquidator of the company in exchange for shares. H. had deposited the certificates with the solicitor as a security for costs, none of which had been paid, and subsequently transferred his shares, with notice of the solicitor's lien, to the plaintiffs. The retainer was continued by the plaintiffs, who now claimed the cheques free from any lien for charges due from H. The court held that the solicitor was entitled to a lien upon them for his costs of all proceedings against the company in respect of the shares (*s*).

They were not allowed —

1. In a suit by a residuary legatee against the sole surviving trustee of a testator's estate. An administration decree was made, and an order for new trustee. The plaintiff stopped further proceedings, but his solicitor in the suit was not allowed to charge the plaintiff's interest in the estate under sect. 28, as there had been no property recovered or preserved (*t*).
★ 2. So when an interlocutory injunction was granted [★ 444] against building higher, the suit was afterwards compromised on the terms that the building should remain at its then height (*u*).

(*p*) Pritchard *v.* Roberts, L. R., 17 Eq. 222.
(*q*) *Ib.*; see Baile *v.* Baile, L. R., 13 Eq. 497; Jones *v.* Frost, L. R., 7 Ch. 773; DeBay *v.* Griffin, L. R., 10 Ch. 291.
(*r*) Pilcher *v.* Arden, 7 Ch. Div. 318.
(*s*) The General Share Trust Co. *v.* Chapman, 1 C. P. Div. 771.
(*t*) Pinkerton *v.* Easton, L. R., 16 Eq. 490.
(*u*) Foxom *v.* Gascoigne, L. R., 9 Ch. 654.

Eighthly, as to wharfingers.]—Their lien for costs and charges will be upheld even as to goods bearing pirated trade marks, and as against the owner of the trade mark, provided they are not parties to the fraud, and in the proceedings occupy the position of stakeholders (*x*).

Ninthly, innkeepers.]—The extent of an innkeeper's lien was determined by the Court of Appeal in 1878 in *Mulliner* v. *Florence* (*y*). A guest and his horses and carriages were received and maintained at an inn. He became indebted to the inn-keeper in respect of his own maintenance, and for the keep and care of his horses and carriages. Pollock, B., held that the innkeeper's lien upon the horses and carriages was for the whole amount of the bill, and was not a particular lien. This decision was affirmed. Brett, L. J., stated the principle of the decision tersely. By the custom of England, the innkeeper is entitled to one lien on the whole of the goods brought into the inn, and this contract cannot be separated into one contract in respect of the house, and another in respect of the stables.

An innkeeper does not, by merely accepting security from his guest for the payment of hotel charges, waive his lien at common law upon the goods of the guest for the amount. There must be something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien, and therefore destructive of it (*z*). The same case is an authority for the proposition, that an innkeeper who retains the goods of his guest by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description.[1]

Ship's husband.]—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer, and not in the nature of a charge on the freight. Hence, if he is removed from his office by the owners before he is [★ 445] in a position to receive the freight, an assignee of ★ his interest in the freight cannot maintain a claim to it as against the owners (*a*).

Where the mortgagor of certain shares in a ship is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight; and where an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage (*b*).

(*x*) See Ponsardin *v.* Peto, 33 Beav. 642; and Moet *v.* Pickering, 8 Ch. D. 372.
(*y*) 3 Ch. Div. 484; 38 L. T. 167. See *supra*, p. 432.
(*z*) Angus *v.* M'Clachlan, 23 Ch. D. 330.
(*a*) Beynon *v.* Godden, 3 Ex. Div. 263. (*b*) *Ibid.*

[1] Story on Agency, § 384; 2 Kent's Com. 634 ns. (d) and y^1, 642 (13th ed.)

Shipwright.]—A shipwright has a lien upon a vessel in his possession for repairs done by him in the absence of an agreement or custom or usage of the port to the contrary, as in London (*c*).

Town clerk.]—A town clerk has a lien on papers for work done as a solicitor (*d*). In a case decided in 1879 (*e*), the Court of Appeal refused, in an interlocutory motion in an action for a mandamus against a town clerk, to compel him to produce such papers unless the plaintiffs paid into court a sum sufficient to meet the amount claimed by the clerk.

Wharfingers.]—Where wharfingers who are made defendants to an action for piracy of a trade mark, on the ground that they have in their custody certain of the fraudulent articles, disclaim all interest in the suit, and submit to act as the court should direct, they shall have their costs, and their lien will not be postponed to the plaintiff's lien for costs if any exists (*f*).

SECT. 5.—*Stoppage* in transitu.

An agent has the right of stoppage *in transitu:*

When he has made himself liable for the price of goods consigned by him to his principal, by obtaining them in his own name and on his own credit (*g*).[1]

★ The right, however, does not exist if at the time of [★ 446] the consignment the agent is indebted to his principal on the general balance of account to a greater amount than the value of the goods, and if such consignment has been made in order to cover this balance (*h*). Nor does the right exist if the agent is only a surety for the price of the goods (*i*).

How exercised.]—The right of stoppage *in transitu* may be exercised either by obtaining actual possession of the goods, or by giving notice of the claim to the person in whose custody they are during the transit (*k*).[2]

(*c*) Raitt *v.* Mitchell, 4 Camp. 146.
(*d*) Rex *v.* Sankey, 5 A. & E. 423.
(*e*) Newington Local Board *v.* Eldridge, 12 Ch. Div. 349.
(*f*) Moet *v.* Pickering, 8 Ch. Div. 372.
(*g*) Hawkes *v.* Dunn, 1 Crom. & Jer. 519.
(*h*) Wiseman *v.* Vandeputt, 2 Vern. 203; Vertue *v.* Jewell, 4 Camp. 31.
(*i*) Siffken *v.* Wray, 6 East, 371.
(*k*) Northey *v.* Field, 2 Esp. 613; Litt *v.* Cowley, 7 Taunt. 169.

[1] If an agent has advanced money or incurred a liability upon the faith of the solvency of his principal, and the latter becomes insolvent while the proceeds and fruits of such advances or liability are in the possession of the agent or within his reach, and before they have come to the actual possession of the principal, the agent has a lien upon the same for his protection and indemnity. And to enforce this lien he may exercise the right of stoppage *in transitu.* Muller *v.* Pondir, 55 N. Y. 325; Seymour *v.* Newton, 105 Mass. 272.

[2] Newhall *v.* Vargas, 13 Me. 93.

How defeated.]—The right to stop *in transitu* may be defeated by the goods arriving in the actual or constructive possession of the consignee (*l*).[1]

The right will be defeated in the following cases:—

1. Where the goods had been delivered at the consignee's own warehouse (*m*):
2. Where they had been delivered on board his ship (*n*), though they are carried at the risk of the consignee (*o*):
3. Where they had been taken possession of by the assignees of the consignees (*p*):
4. Where they had been delivered at a warehouse which the consignee was in the habit of using for the purpose of receiving consignments, unless notice is given that delivery is not to be made to the consignee until payment (*q*):
5. Where they have been delivered at a place where the consignee means them to remain until a fresh destination is communicated to them by his orders (*r*):
6. Where the consignee has determined the transit by doing any act which is equivalent to taking possession on his own account, *e. g.*, by requesting the carrier, after notice of their arrival, to allow them to remain in a warehouse until further orders, the consignee taking samples (*s*):

[★447] ★7. Where the carrier, before the arrival of the goods, agrees to hold the goods as the consignee's agent (*t*):

8. Where the goods remain in the vendor's charge, the vendor receiving warehouse rent for them, unless it is agreed that they are to remain at rent (*u*):

(*l*) Jackson *v.* Nichol, 7 Scott, 577.
(*m*) James *v.* Griffin, 2 M. & W. 622.
(*n*) Schotmans *v.* Lancashire and Yorkshire Rail. Co., L. R., 2 Ch. 332.
(*o*) Van Casteel *v.* Booker, 2 Ex. 691, 708; Wilmhurst *v.* Bowker, 7 M. & G. 882.
(*p*) Ellis *v.* Hunt, 3 T. R. 464; Scott *v.* Pettit, 3 B. & P. 469.
(*q*) Loeschman *v.* Williams, 4 Camp. 181.
(*r*) Wentworth *v.* Outhwaite, 10 M. & W. 436.
(*s*) Foster *v.* Frampton, 6 B. & C. 107.
(*t*) Whitehead *v.* Anderson, 9 M. & W. 518, 535.
(*u*) Miles *v.* Gorton, 2 Cr. & M. 504, per Bayley, J.

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[1] It will not be sufficient for the consignee to make his claim to the goods; he must obtain the actual possession. Newhall *v.* Vargas, *supra*. The right of stoppage *in transitu* is not divested by the goods being seized or levied upon by virtue of an attachment or execution at the suit of a creditor of the purchaser, where the right is exercised before the *transitus* is at an end. Buckley *v.* Furniss, 15 Wend. (N. Y.) 137.

Where goods are shipped on board the consignee's own ship, the master of which signs a bill of lading, by which they are to be delivered to the owner, this amounts to a constructive deliver and the *transitus* is at an end. The consignor cannot afterwards stop the goods, in case of the insolvency of the consignee before their arrival. Bolin *v.* Huffnagle, 1 Rawle, (Pa.) 1.

See, also, Stubbs *v.* Lund, 7 Mass. 453, and Covell *v.* Hitchcock, 23 Wend. (N. Y.) 611.

9. Where the bill of lading has been assigned *bonâ fide* (*x*).
10. Where the consignee, under a bill of lading, takes possession of part of the goods consigned with the intention of exercising dominion over the whole (*y*).

Where the vendee takes possession of a part of the goods with the view of separating the part delivered from the rest, and not meaning thereby to take possession of the whole, then the transit is determined only as to that part and no more (*y*).

The right will not be defeated—

1. By a claim of the carrier against the consignee (*z*):
2. By a pledge of the bill of lading (*a*):

The right of stoppage *in transitu* is not discharged absolutely by an indorsement of a bill of lading by way of security or pledge; but it remains subject to a charge in favour of the indorsee of the bill of lading, which must be paid off, and which, being paid off, the person entitled to and exercising the right of stoppage *in transitu* stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading (*b*). No sale "to arrive" by the consignee to sub-purchasers, even with payment, will put an end to the right of stoppage unless the bill of lading is indorsed (*c*).

3. By a mere sale of the goods by a consignee (*d*):
4. By a creditor attaching the consignee's right without obtaining actual possession (*e*):

By delivery of part of the goods (*f*):

★6. By part payment (*n*), or giving bills which are in [★448] the hands of third parties (*o*).

7. By delivery to a carrier.

The contract with a carrier to carry goods does not make him the agent or servant of the person with whom he contracts. As soon as the goods are appropriated by the vendor to the contract, and are placed on board, the property passes to the purchaser, and as between the vendor and the purchaser there is a delivery to him, constructive, not actual. Delivery of goods by a vendor to a carrier is only constructive, even though the carrier is nominated and hired by the purchaser. Till the goods are in the actual possession of the purchaser,

(*x*) Rodger *v.* Comptoir D'Escompte de Paris, L. R., 2 P. C. 393; Cumming *v.* Brown, 9 East, 506, 514.
(*y*) Tanner *v.* Scovell, 14 M. & W. 28.
(*z*) Oppenheim *v.* Russell, 3 B. & P. 42.
(*a*) *Re* Westzinthers, 5 B. & Ad. 817.
(*b*) Kemp *v.* Falk, 7 App. Cas. 573, following *In re* Westzinthers, 5 B. & Ad. 817; and Spalding *v.* Ruding, 6 Beav. 376; 12 L. J., Ch. 503.
(*c*) *Ibid.*
(*d*) Miles *v.* Gorton, 2 Cr. & M. 504; Dixon *v.* Yates, 5 B. & Ad. 339.
(*e*) Smith *v.* Goss, 1 Camp. 282.
(*f*) Miles *v.* Gorton, *supra*; Grice *v.* Richardson, 3 App. Ca. 319; Townley *v.* Crump, 4 Ad. & E. 58.
(*n*) Hodgson *v.* Loy, 7 T. R. 440.
(*o*) Feise *v.* Wray, 6 East, 93; Patten *v.* Thompson, 5 M. & S. 350.

the transit is not at an end, and it is immaterial that their ultimate destination has not been communicated by the purchaser to the vendor (*p*).

Where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues only till they arrive at that place of destination. Thus, delivery at a packer's warehouse on behalf of the vendee (*q*), or to the vendee's forwarding agent (*r*), determines the vendor's right to stop.

Goods are said to be sent to their "destination" when they are sent to the purchaser, or to the person to whom he directs them to be sent, *i. e.*, to a particular person at a particular place (*s*). The question is, what is the destination of the goods as between the buyers (who may be commission agents) and the sellers? The fact that the goods wait at that place for further orders from the purchaser to put them again in motion does not prevent the transit from being at an end (*t*). *Ex parte Watson* (*u*) is consistent with this view of the law.[1]

Sect. 6.—*Right of Agent to interplead.*

By the rule in equity an agent was not allowed to have an interpleader against his principal except in cases where the latter [★449] ★ had created a lien in favour of a third party, and the nature of that lien was in controversy (*x*). Since the passing of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), and the new procedure under the Judicature Acts, this rule has lost its force. Interpleader has been granted at the instance of an auctioneer (*y*) and of a bailee (*z*).

Sect. 7.—*Right to an account.*

As to the right of an agent to proceed against his principal for an account in Chancery, see *Dinwiddie* v. *Bailey* (*a*): *Phillips* v. *Phillips* (*b*); *Foley* v. *Hill* (*c*); *Smith* v. *Leveaux* (*d*).

(*p*) *Ex parte* Rosevear China Clay Co., 11 Ch. Div. 560. And see Bethell *v.* Clark, 19 Q. B. D. 553 . . 1887.
(*q*) Leeds *v.* Wright, 3 B. & P. 320; Scott *v.* Pettet, 3 B. & P. 469.
(*r*) Kendall *v.* Marshall, 11 Q. B. Div. 356.
(*s*) *Ex parte* Miles, *Re* Isaacs, 15 Q. B. D. 39, per Brett, M.R.; and see *Ex parte* Francis, *Re* Bruno, 56 L. T. 577.
(*t*) *Ib.*; Dixon *v.* Baldwin, 5 East, 175; Valpy *v.* Gibson, 4 C. B. 837, p. 865, per Wilde, C. J.
(*u*) 5 Ch. D. 35. (*x*) Smith *v.* Hammond, 6 Sim. 10.
(*y*) Best *v.* Hayes, 1 H. & C. 718; 32 L. J., Ex. 129.
(*z*) Attenborough *v.* St. Katharine's Dock Co., 3 C. P. Div. 453.
(*a*) 6 Ves. 136. (*b*) 6 Ha. 471. (*c*) 2 H. of L. C. 28. (*d*) 33 L. J., Ch. 167.

[1] 2 Kent's Com. 540 *et seq.*

★ CHAPTER VI. [★ 450]

RIGHTS OF AGENT AGAINST THIRD PARTIES.

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SECT. 1.—*Upon Contracts.*

Agent's right of action on contracts.]—An agent is entitled to bring an action against third persons upon contracts to which they are parties—

(1.) Where the agent has contracted personally;
(2.) In certain cases where the agent is the real principal;
(3.) Where the agent has a special interest in the subject-matter of the contract;
(4.) In some cases where money is paid on contract which turns out to be illegal, or where it is paid by mistake.

Where the agent has been promised a sum for violating his duties he has no right of action.

Firstly. Where the agent has contracted personally.]—It is a well-established rule of law that when a contract not under seal is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it, the defendant, in the latter case, being entitled to be placed in the same position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party. This rule is most frequently acted upon in sales by factors, agents or partners, in which case either the nominal or real contractor may sue; but it may be equally applied to other cases.[1] When, ★ however, money is lent [★ 451]

[1] Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429; Van Staphorst *v.* Pearce, 4 Mass. 258; Blanchard *v.* Page, 8 Gray (Mass.), 281; Buffum *v.* Chadwick, 8 Mass. 103,

in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own (*a*). Hence, where one of the managing owners of a vessel was permitted by the other owners to have the possession of the warrants to pay to the owners or bearer a sum of money for freight, and the managing owner deposited the warrants in the hands of his bankers, who received the money due on them, and gave him credit for it in account, the court held that, on proof of the above facts, the other owners could not recover the money from the bankers, because it was not shown that the loan was upon this account (*a*). This case is to be distinguished from cases where the contract is, in point of law, the contract of the principal, the question in *Sims* v. *Bond* being whether the plaintiffs were from the beginning the contracting parties.

Contract signed by agent.—*Cooke* v. *Wilson* (*b*), decided in the year 1856, was an action upon a charter-party, in which it was said: "It is this day mutually agreed between J. & R. W., owners of the ship 'Jessica,' of the first part, and S. J. C. (the plaintiff,) on behalf of the G. & M. Railway Company, of the other part." The agreement was signed "J. and R. W., S. J. C." In an action by the plaintiff for a breach of the agreement, the defendants demurred to the claim, on the ground that the declaration did not show any cause of action in the plaintiff, who was merely an agent. The demurrer was overruled. "I have always understood the law to be," said Mr. Justice Crowder, "that if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only." Here, of course, the plaintiff signed the contract in his name simply, and was consequently clearly liable upon it.

Where the principal is a foreigner.]—Similarly, as there is a presumption that the agent of a foreign principal or foreign house has no authority to pledge the credit of the latter, therefore the agent is *primâ facie* entitled to sue upon contracts made for such principal (*c*).[1]

(*a*) Per Curiam, Sims *v.* Bond, 5 B. & Ad. 389.

(*b*) Cooke *v.* Wilson, 1 C. B., N. S. 153.

(*c*) Houghton *v.* Matthews, 3 B. & P. 485, 490; Hutton *v.* Bullock, L. R., 9 Q. B. 572.

Fish *v.* Jacobshon, 2 Abb. Ct. App. (N. Y.) 132; Considerant *v.* Brisbane, 22 N. Y. 389; Johnson *v.* Catlin, 27 Vt. 87; Chandler *v.* Coe, 54 N. H. 561; McConnell *v.* Thomas, 2 Scam. (Ill.) 309; Moore *v.* Penn, 5 Ala. 135; Saladin *v.* Mitchell, 45 Ill. 79; Everitt *v.* Bancroft, 22 Ohio St. 172; Shepherd *v.* Evans, 9 Ind. 260; Brewster *v.* Saul, 8 La. 296; Grover *v.* Warfield, 50 Ga. 644; Bragg *v.* Greenleaf, 14 Me. 395; Barbee *v.* Williams, 4 Heisk. (Tenn.) 522; Grace *v.* Herndon. 2 Tex. 410. When the agent brings suit he is bound to disclose the name of his principal. Willard *v.* Lugenbuhl, 24 La. An. 18.

[1] Tainter *v.* Prendergast, 3 Hill (N. Y.), 72; Rogers *v.* March 33 Me. 106; McKenzie *v.* Nevins, 22 Me. 138.

The foreign principal is not precluded from bringing an action in his own

★ *Secondly, where the agent is the real principal.*]—The [★452] mere fact that the agent has contracted as agent will not disentitle him to sue. This point was elaborately discussed in 1846 by the Court of Exchequer in *Raynor* v. *Grote* (*d*). This was an action by an agent for non-acceptance of goods. The plaintiff made a written contract for the sale of goods, in which contract he described himself as the agent of a named principal. The buyers accepted and paid for a portion of the goods, and then had notice that the plaintiff was himself the real principal in the transaction; they thereupon refused acceptance of the rest of the goods. At the trial Mr. Justice Cresswell directed the jury, that if they were satisfied from the evidence that the defendants had received the first portion of the goods with full knowledge of the fact that the plaintiff was the real seller, and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction, he was entitled, subject to other questions which arose in the cause, to recover in this action. The jury found for the plaintiff. Upon motion for a new trial, it was argued on behalf of the defendants, that the true question was whether evidence could be given to show that the contract, though made in the name of a principal, was made in fact by the agent; if so, a new contract is made differing in time and consideration from that declared upon. The case of a contract with a builder of repute was cited, and it was asked whether another could come in and say he was the principal. Baron Alderson, in delivering the judgment of the court, said: "If, indeed, the contract had been wholly unperformed, and one which the plaintiff, merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases—such as, for instance, the case of contracts in which the skill or solvency of the person who is named by the principal may reasonably be considered as a material ingredient in the contract—it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of him who is the real principal, may be the general rule." The motion, however, was dismissed upon the ground that this contract had been in part performed, ★ and that part performance [★453] was accepted by the defendants with full knowledge that the plaintiff was not the agent, but the real principal. Hence the court came to the conclusion that the plaintiff was fully entitled to say that the defendants could not refuse to complete that contract, but must receive the remainder of the goods and pay the stipulated price for them.

(*d*) 15 M. & W. 359.

name, even though the agency was not disclosed at the time the contract was entered into. Barry *v.* Page, 10 Gray (Mass.), 398.

Contract made on behalf of principal—Agent cannot sue in his own name.]—To the same effect it has been said that if an agent acts for and on behalf of the principal but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless the defendant can show that the agent is prohibited from carrying on the action by the person on whose behalf the contract was made. Where, however, the agent has contracted on behalf of his principal and in his principal's name, he will not be allowed to sue in his own name, in respect of goods which have not come into his possession, although he has made advances to his principal in respect of such goods (*e*).[1] The distinction taken in an old case is, that if goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost, but if the bill be to deliver to A. for the use of B., B. ought to bring the action (*f*).

Broker functus officio on completion of contract.]—An opinion prevailed until within a recent period that a broker could sue his principal in his own name on contracts made by him as broker, although he had no interest in the subject-matter of the contract. In *Fairlie* v. *Fenton* (*g*), decided in 1870, a broker sued the defendants for non-acceptance of cotton. In the bought-note the words were, "I have this day sold you, on account of T., &c. Signed, S. F., broker." The court, whilst recognizing the fact that there are cases where an agent may sue in his own name,—as when, for instance, he either has an interest in the subject-matter of the contract, or when the contract is so framed as to make him a party to it,—made absolute a rule to nonsuit the plaintiff. If a man sells goods, whilst acting as broker, the moment the sale is complete he is *functus officio* (*h*).

[★ 454] ★ *Contract by agent where no principle in existence.*]—In *Sharman* v. *Brandt* (*i*), decided in the Exchequer Chamber in 1871, the plaintiff, a broker, was authorized by the defendants to buy a quantity of hemp for them. He sent them a contract note, "bought for B. and H. (the defendants) of our principals," and signed W. S. and Co. (the plaintiff's business name), brokers. At the trial it appeared that the plaintiff had no principal as seller, a fact which was not proved to have been known to the defendants. A nonsuit was directed at the trial, on the ground that there was no sufficient memorandum to satisfy the Statute of Frauds (*k*).

(*e*) Sargent *v.* Morris, 3 B. & Ald. 277.
(*f*) Evans *v.* Marlett, Ld. Raym. 271.
(*g*) L. R., 5 Ex. 169.
(*h*) Per Lord Ellenborough, Blackburn *v.* Scholes, 2 Camp. 341.
(*i*) L. R., 6 Q. B. 720.
(*k*) Wright *v.* Dannal, 2 Camp. 203.

[1] Gunn *v.* Cantine, 10 Johns. (N. Y.) 387; Whitehead *v.* Potter, 4 Ired. L. (N. C.) 257.

This ruling was upheld by the Court of Queen's Bench, whose judgment was affirmed on appeal. The judges for the most part based their decision upon the fact that there was no contract within the Statute of Frauds. Chief Baron Kelly expressed an opinion that a contract between a broker, though in his own person, but expressed to be as a broker for an unnamed principal, and a purchaser, is not a contract made between the broker as unnamed principal and the buyer. Baron Martin doubted whether there was any contract at all, inasmuch as a man employed to purchase cannot make himself a principal in the contract.

Insurance brokers.]—There is in the case of insurance brokers an apparent exception to the rule that a broker cannot sue in his own name. Policies not under seal in this country are generally effected by brokers in their own name for the benefit of a named principal, or of whom it may concern. The action on the policies so effected may be brought either in the name of the principal for whose benefit it was made (*l*), or of the broker who was immediately concerned in effecting it (*m*).[1] When the policy is by deed a distinction has been drawn between a deed under seal *inter partes* and a deed-poll, *i.e.*, a deed which is made by one party only. The rule of the law of England is, that the force and effect of a deed under seal cannot exist unless the deed is executed by the party himself, or by another for him in his presence and with his direction, or, in his absence, by an agent authorized to do so by another deed, and in every such case the deed must be made and executed in the name of ★ the principal; where, however, the deed is a deed- [★ 455] poll, although but one person is named as assured therein, yet all who are interested in the insurance may be joined with him as plaintiffs in the action (*n*).

Distinction between contracts executed and such as are executory.]—The right of an agent to sue as principal upon contracts made by him as agent, depends in certain cases upon the fact whether the contract is executory or executed. The limitation to the agent's right to sue exists only in contracts when a principal is named, and not to those cases where he is not named in the contract (*o*). When the defendant has received the benefit of the contract, there is nothing in the limitation under consideration to prevent the agent suing in his own name; but in executory contracts, where the skill or solvency of the person who is named as the principal, may reasonably be considered as a material ingredient in the

(*l*) Browning *v.* Provincial Insurance Company, L. R., 5 P. C. 263.
(*m*) Provincial Insurance Company of Canada *v.* Leduc, L. R., 6 P. C. 224; see Arnould, Mar. Ins., p. 1086.
(*n*) Sanderland Marine Insurance Company *v.* Kearney, 16 Q. B. 925.
(*o*) Per Curiam, Schmalz *v.* Avery, 15 Jur. 293.

[1] Leeds *v.* Marine Ins. Co., 6 Wheat. (U. S.) 565. See Stackpole *v.* Arnold, 11 Mass. 27.

contract, the agent cannot show that he is the real principal (*p*). It is said that this rule is applicable in all cases of executory contracts, if they are wholly unperformed, or if they are partly performed without its being known who is the real principal (*q*).

Assumpsit on charter-party by agent of unnamed freighter.]—In *Schmalz* v. *Avery* (*r*) decided in 1851, which was an action in *assumpsit* on a charter-party stated to be made by the plaintiff as agent for the freighter, it concluded, "This charter-party being concluded on behalf of another party," &c. No principal was named. At the trial it appeared that the plaintiff was the real principal. Justice Wightman ruled that the plaintiff was concluded by the terms of the instrument from saying he was not agent, and that the evidence altered the written contract. A rule to enter the verdict for the plaintiff was made absolute by the full court.

"The question," said Mr. Justice Patteson, "is reduced to this—whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be; and are to lay it down as a broad rule, that a person contracting as [★ 456] agent for an unknown and unnamed principal, is ★ excluded from saying, 'I am myself that principal.' Doubtless, his saying so does in some measure contradict the written contract. It may be that the plaintiff entered into the charter-party for some other party, who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal. In either case the charter-party would be, strictly speaking, contradicted; yet the defendant does not appear to be prejudiced, for as he was regardless who the real freighter was, it would seem that he trusted for his freight to his lien on the cargo."

Effect of notice that agent is also principal.]—A person who has contracted as agent for another whom he names, cannot at once throw off that character, and put himself forward as principal, without communication or notice to the other party (*s*). The soundness of this *ratio decidendi* was questioned by the Court of Exchequer in a subsequent case (*t*), when the plaintiff, being the real principal, contracted as agent for J., and sued the defendant for not accepting and paying for the goods. The defendant had accepted and paid for a part of the goods sold, and then had notice, before he refused the remainder, that the plaintiff was the real principal; and the court held that the action lay (*u*).

When the agent's right is due to his character as agent, he has no personal right to sue.]—In *Pigott* v. *Thompson* (*v*), the defendant

(*p*) *Ib.*, quoting Raynor *v.* Grote, 15 M. & W. 359.
(*q*) *Ibid.*
(*r*) 20 L. J., Q. B. 228; 15 Jur. 291.
(*s*) Bickerton *v.* Burrell, 5 M. & S. 383.
(*t*) Raynor *v.* Grote, 15 M. & W. 359.
(*u*) See Schmalz *v.* Avery.
(*v*) 3 Bos. & Pul. 147.

had agreed in writing to pay the rent of certain tolls which he had hired to the treasurer of the commissioners, and the Court of Common Pleas held that no action to recover such rent could be maintained in the name of the treasurer. "It is not necessary to decide," said Lord Alvanley, "whether, if A. let land to B. in consideration of which the latter promises to pay the rent to C., C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient. In the present case the agreement is, that in consideration that the commissioners have let the tolls to the defendant, he will pay to their treasurer. Now, it is said that this amounts to a promise to pay to the person who was the treasurer at that time; but I am clear that such was not the meaning of the instrument, and that if the plaintiff had been removed from his office it would have been a payment ★ which would not have [★ 457] availed the defendant if he had persisted to account with the present plaintiff. The manifest intention of the agreement was, that the defendant should pay the money to any person whom the commissioners should choose to make their treasurer for the time being." So an action brought by the treasurer of a synagogue to recover the rent of the seats in the building failed for the same reason (*x*).

Thirdly. When the agent has a special interest.][1]—In *Atkyns* v. *Amber* (*y*), decided before Chief Justice Eyre in the year 1796, the declaration stated that in consideration that the plaintiffs would sell to the defendant a cargo of timber, the defendant undertook to pay them with a bill for the value: averment, the delivery of the timber: breach, the not giving the bill as agreed. At the trial, it appeared that H. employed the plaintiffs as brokers, and that the latter had advanced money to H. on the timber in question. The sale note was made in the name of H. His lordship, however, ruled that inasmuch as the plaintiffs had "a special property in the timber," there was no variance, and a verdict for the plaintiffs was found.

Lien of agent on goods sold—Principal indebted to buyer.]—The claim of an agent who sells goods upon which he has a lien cannot be defeated by a plea that the principal is indebted to the buyer. The law has been thus stated by Lord Mansfield: "We think that a factor who receives cloths, and is authorized to sell them in his own

(*x*) Israel *v.* Simmons, 2 Stark. 356; and see Bowen *v.* Morris, 2 Taunt. 374.
(*y*) 2 Esp. 493.

[1] As where an auctioneer, employed to sell real estate on terms which contemplate the payment of a deposit into his hands by the buyer at the time of the auction, and before the completion of the sale by the delivery of the deed, may sue for such deposit in his own name whenever an action for it, separate from the other purchase money, may become needful. Thompson *v.* Keely, 101 Mass. 291. An auctioneer may also maintain an action for the price of goods sold. Hulse *v.* Young, 16 Johns. (N. Y.) 1; Graham *v.* Duckwall, 8 Bush. (Ky.) 12; Everitt *v.* Bancroft, 22 Ohio St. 172; Beller *v.* Block, 19 Ark. 566.

name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the moneys; his receipt is a discharge for the buyer, and he has a right to bring an action against him to compel the payment; and it would be no defence for the buyer in that action to say, that as between him and the principal he (the buyer) ought to have that money because the principal is indebted to him in more than that sum, for the principal himself can never say that but when the factor has nothing due to him" (*z*).

Fourthly. When money is paid by mistake or under illegal contract.]—Lord Mansfield stated as a rule of law in an early case, that "where a man pays money by his agent, which ought not to have [★ 458] been paid, either the agent or principal may bring an ★ action to recover it back. The agent may, from the authority of the principal, and the principal may as proving it to have been paid by his agent" (*a*)[1]. The same rule applies when the money is paid by the agent on a contract which turns out to be illegal owing to facts of which the agent was ignorant. Thus, where an insurance had been made on goods from a port in Russia to London, by an agent residing here for a Russian subject, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed and been seized and confiscated, the court held that the policy was void in its inception, but that the agent of the assured was entitled to a return of the premium paid in ignorance of the fact of hostilities (*b*). At the trial Lord Ellenborough ruled that the plaintiffs having effected the insurance without any consciousness of its illegality at the time, were entitled to recover back the premium as money had and received by the defendant, to their use and without consideration. On a motion to enter a nonsuit, it was argued that the insurance was either legal or illegal; if it was legal, and the risk attached for an instant, the plaintiffs could not recover the premium; if it was illegal, the plaintiffs would be equally unable to recover. A rule was refused on the grounds that the plaintiffs had no knowledge of the commencement of hostilities and that the risk never attached.

Fifthly. Claims in respect of secret promises.]—An agent who has been secretly promised a sum of money as an inducement to do something in derogation of his duty to his principal, will not be entitled to recover such sum although such promise had no effect upon his mind (*c*). The principle of this and similar cases, has been cited in an illustration of the rule, that orders made by jus-

(*z*) Drinkwater *v.* Goodwin, Cowp. 251.
(*a*) Stevenson *v.* Mortimer, Cowp. 805.
(*b*) Oom *v.* Bruce, 12 East, 225.
(*c*) Harrington *v.* Vic. Grav. Dock Co., 3 Q. B. Div. 549; 47 L. J., Q. B. 594.

[1] Kent *v.* Bornstein, 12 Allen (Mass.) 342.

ties of the peace, in matters in which they are interested, will be set aside by proceedings in certiorari (*d*).

Defences in action by agent on contract.]—Where the agent sues in his own name the defendant may avail himself of all defences which would be good at law and in equity:

(a) As agent, the plaintiff on the record, or

★ (b) As against the principal for whose use the action [★459] is brought, provided, of course, a principal exists.

Payment by giving agent credit.]—The authorities at common law upon the first point were very fully examined in a considered judgment of the Court of Common Pleas, in 1833. A broker, in whose name a policy of insurance was effected, brought covenant, and the defendants pleaded payment to the plaintiffs, the proof being that, after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them. It was held that, although there was no payment as between the assured and assurers, the payment was good as between the plaintiffs on the record and the defendants (*e*). The earlier authorities are consistent with this decision, and warrant the position that a plaintiff, though he sues as a trustee of another, must, apart from equitable considerations, be treated in all respects as the party in the cause; if there is a defence against him, there is a defence against the *cestui que trust* who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself (*f*).

Admissions by plaintiff on record.]—In *Bauerman* v. *Radenius*(*g*), in which the question was whether the admission by the plaintiff, who was a trustee for another, could be received in evidence, Lord Kenyon said: "I take it to be an incontrovertible rule, that an admission made by the plaintiff on the record is admissible evidence." So a release by the plaintiff on the record suing for the benefit of another was decided, in a case before Lord Mansfield (*h*), to be a good answer at law, and Mr. Justice Lawrence expresses the same opinion in the case last mentioned. The courts of law have been in the habit of exercising an equitable jurisdiction on motion, and setting such releases aside, or preventing the defendant from pleading them (*i*). This practice shows that, but for the equitable interference of the courts, the real plaintiff would be barred. By the

(*d*) See *per* Field, J., in Reg. *v.* Great Yarmouth, Justices of, 8 Q. B. 525; Reg. *v.* Rand, 1 Q. B. D. 230; Reg. *v.* Mayer, *ib.* 173; Reg. *v.* Huntingdon, Justices of, 4 Q. B. D. 522; Reg. *v.* Handsley, 8 Q. B. 353; Reg. *v.* Lee, 9 Q. B. D. 394.

(*e*) Gibson *v.* Winter, 5 B. & Ad. 96.

(*f*) *Ibid.*

(*g*) 7 T. R. 668.

(*h*) Cited in Bauerman *v.* Radenius, *supra*.

(*i*) Legh *v.* Legh, 1 Bos. & Pul. 447.

operation of the Judicature Acts, a plea which is no answer in equity will no longer avail a defendant. See 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

[★ 460] ★*Admission of principal—Action by master for freight.*]—With respect to the second point, Mr. Justice Bayley pointed out in *R.* v. *Harwick* (*k*), that *Bauerman* v. *Radenius* only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence. Accordingly, in an action by the master of a ship for freight, Lord Ellenborough ruled that, although the action was in the name of the master, it was brought for the benefit of the owner, and that, therefore, anything said by the latter was admissible evidence for the defendant (*l*).

Action by auctioneer—Agreement between owner of goods and purchaser.]—In *Grice* v. *Kenrick* (*m*), which was decided in 1870, the plaintiff was an auctioneer employed by one Weir to sell certain goods by auction. The action was brought to recover the price of the articles bought by the defendant at the auction, and afterwards received by him. The defence set up was, that before the sale the defendant, who was a creditor of Weir, had agreed with him that he should bid at the auction, and receive the goods for which he should be the highest bidder in payment of the debt due to him. It was contended on behalf of the plaintiff that, as he had no notice of this agreement at the time of the sale, and gave up the goods to the defendant on the faith of his paying for them, he, the plaintiff, was entitled to recover. The plaintiff had paid over to Weir a greater sum than the amount of the purchases made by the defendant after notice of the agreement between Weir and the defendant.

Mr. Justice Hannen, who delivered the judgment of the court, said: "It was contended that the fact that the plaintiff gave up the goods to the defendant on the faith of his paying for them created a liability on the part of the latter to make such payment. If there had been any deceit practised by the defendant on the plaintiff, or if there had been any facts accompanying the receipt of the goods from which a promise on the defendant's part to pay the auctioneer could be inferred, the plaintiff would be entitled to recover; but the defendant, in obtaining the goods from the plaintiff without pay-
[★ 461] ment, did no ★ more than he was entitled to do as between himself and Weir, and he was justified in assuming that the plaintiff, in giving up the goods without payment, was doing so in fulfilment of the agreement of his principal." In the present case the conditions which were wanting in *Robinson* v. *Rutter* (*n*), were supplied. By the terms of the agreement between defendant and Weir, the defendant was entitled to have the goods without pay-

(*k*) 11 East, 578.
(*l*) Smith v. Lyon, 3 Camp. 465.
(*m*) L. R., 5 Q. B. 344.
(*n*) 24 L. J., Q. B. 250.

ment; and it appeared that, as between the plaintiff and Weir, the plaintiff's charges in respect of the goods delivered to the defendant had been satisfied before action.

SECT. 2.—*Rights of Agent against Third Parties in Tort.*

What ownership gives right of action for conversion.]—Any special or temporary ownership of goods, with immediate possession, is sufficient to maintain an action for conversion (*o*). An agent having such special property, with immediate possession, may maintain an action against the absolute owner for wrongful conversion, but can only recover damages in respect of his limited interest (*p*). If an agent is not in possession at the time of the conversion, and has to rely upon his right only, he may be called upon to prove a good title, and the defendant will be allowed to rebut his title by showing a *jus tertii* (*q*). Where the defendant has disturbed the actual possession of the plaintiff, he will not be allowed to set up a *jus tertii*, unless he can justify his act under the authority of the third party (*r*).

First, as to the cases where the agent has been in possession of the goods or chattels in respect of which he sues:—[1]

Simple bailee, agister, carrier, factor, &c.]—*Burton* v. *Hughes* (*s*) the owner of furniture lent it to the plaintiff under the terms of a written agreement. The plaintiff placed it in a house occupied by the wife of a bankrupt. The assignees of the bankrupt seized the furniture, and the Court of Common Pleas held that the plaintiff might recover it in trover without producing the agreement. "The case of *Sutton* v. *Buck* (*t*), which ★ has been referred to," [★462] said Chief Justice Best, "confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." In that case a person whose title was not completed by registry of a regular conveyance sued in trover to recover a ship of which he had been possessed. "Suppose a man," observed Chief Justice Mansfield, "gives me a ship, without a regular compliance with the Register Act, and I fit it out at 500*l.* expense, what

(*o*) Legg *v.* Evans, 6 M. & W. 36.
(*p*) Roberts *v.* Wyatt, 2 Taunt. 268.
(*q*) Leake *v.* Loveday, 4 M. & G. 972; Gadsden *v.* Barrow, 9 Ex. 514.
(*r*) Jeffries *v.* The South Western Railway Company, 5 E. & B. 802; 25 L. J., Q. B. 107.
(*s*) 2 Bing. 183. (*t*) 2 Taunt. 302.

[1] Where goods are sold by an auctioneer on a condition which is not complied with he may retain replevin therefor. Tyler *v.* Freeman, 3 Cush. (Mass.) 261. An agister of cattle may maintain trespass or trover against a stranger for taking them away. Bass *v.* Pierce, 16 Bard. (N. Y.) 595. A bailee may maintain trover against all persons but the rightful owner, if property in his possession be taken from him. Faulkner *v.* Brown, 13 Wend. (N. Y.) 63; Beyer *v.* Bush, 50 Ala 19.

a doctrine it is that another man may take it from me and I have no remedy!" "There is enough property in the plaintiff," remarked Mr. Justice Lawrence, "to enable him to maintain trover against a wrongdoer; and although it has been urged that the contract is void with respect to the rights of third persons, as well as between the parties, yet so far as regards the possession, it is good as against all except the vendor himself." The rule laid down by Mr. Justice Chambre, in the case cited by Chief Justice Best, is that an agister, &c., a carrier, a factor may bring trover. A general bailment will support the action, though the bailment is made only for the benefit of the true owner.

Gratuitous bailee.]—In *Ruth* v. *Wilson* (*u*), which was an action on the case against the defendant for the not repairing the fences of a close adjoining that of the plaintiff, whereby a horse of the plaintiff fell into the defendants' close and was killed, it was objected that the plaintiff had not such a property in the horse as to entitle him to maintain the action, he being merely a gratuitous bailee. A verdict having been found for the plaintiff, the court discharged a rule for a new trial. "I think," said Mr. Justice Abbott, "that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action." Mr. Justice Holroyd based the liability of the defendant on the ground that the plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others.

Secondly, as to cases where the agent has not been in possession:—

Consignee of undelivered goods.]—In *Fowler* v. *Down* (*x*), which was decided by the Court of Common Pleas in 1797, Chief Justice [★ 463] Eyre pointed out that it is not true that, in cases of ★ special property, the claimant must have had possession in the order to maintain trover, citing the case of a factor to whom goods have been consigned and who has never received them.

Property in the hands of a depositary.]—In *Bryans* v. *Nix* (*y*), a corn merchant, T., who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors, for sale at Liverpool, obtaining from them acceptances on the faith of such consignments, obtained from the masters of canal boats, No. 604 and No. 54 receipts signed by them for full cargoes of oats deliverable to the agent of T. in Dublin, in care for the plaintiffs. T. inclosed the receipts to the plaintiffs, and drew a bill on them against the value of the cargo, which the plaintiffs accepted, on 7th February, and paid when due. On 6th February, W., an agent of the defendant, who was T.'s factor for sale in London, pressed T. for security for previous advances, and T. gave W. an order on the Dublin agent to deliver to W. the cargoes of the boats on the arrivals. Only boat 604 was

(*u*) 1 B. & Ald. 59.
(*x*) 1 B. & P. 44.
(*y*) 4 M. & W. 775.

loaded when the receipt was given by the masters, and the acceptances were obtained from the plaintiffs. The loading of 54 was completed on the 9th, and T. then sent to W. a receipt signed by the master similar to that sent to the plaintiffs, making the cargo deliverable to W., who took possession of both cargoes. The court held that the property in the cargo of boat 604 vested in the plaintiffs on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs when the receipt for that boat was given by the master. "The transaction," said Baron Parke, who delivered the judgment of the court, "is in effect the same as if T. had deposited the goods with a stakeholder, who had assented to hold them for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not; and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary—no matter whether ★ such de- [★ 464] positary be a common carrier or shipmaster employed by the consignor or a third person—and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is affected, nor is it material whether the person who is to have that property be a factor or not; for such an agreement may be made with a factor as well as any other individual." In *Anderson* v. *Clark* (*z*), a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery. When, however, the relation between consignor and consignee is simply that of principal and factor, the latter has no such interest in consignments that have not come into possession as to entitle him to maintain trover against the carrier who claims a lien (*a*).

Consignments to factors for sale—Advances—Mutual credits.]—Lord Ellenborough observed, in *Patten* v. *Thompson* (*b*), that "if it be taken that the cargo was consigned to the Liverpool house as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances on the responsibility they had contracted in respect of the cargo. But the case as it now stands seems to me to go further, and that the defendant, in order to succeed in his

(*z*) 2 Bing. 20.
(*a*) Kinloch *v.* Craig, 3 T. R. 783.
(*b*) 5 M. & S. 350.

claim, must make out this position, that whenever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor upon account, the circumstance of their being mutual credits between them, does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and to keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction,—if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated,—this would have been a different case." [★ 465] ★ *Specific appropriation of goods supports trover.*]—In *Evans* v. *Nichol* (*c*), which was decided in 1841, trover was brought for a quantity of alkali and potash, and the defendants pleaded that the plaintiffs were not possessed, as of their own property, of the goods mentioned. At the trial, it appeared that a manufacturer at Newcastle consigned the potash and alkali to E. and Co., the plaintiffs, their factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt signed by the mate of the vessel. The receipt acknowledged the goods to have been received for E. & Co. At the time of the shipment the consignor was indebted to the shipowners for freights due on former shipments. He became bankrupt, whereupon the shipowners refused to sign the bills of lading, claiming a general lien. The vessel reached London, and the shipowners sent to their agents there (the defendants) an order for the goods in question. The defendants received the goods, and refused to deliver them to E. and Co. An unsuccessful attempt was made to prove a custom to a general lien, and Chief Justice Tindal ruled upon the other question, that the circumstances of the alkali having, at the time of the shipment, been specifically appropriated by the consignor to the bill, vested such a property therein in the plaintiffs as to enable them to maintain trover. A rule *nisi* to enter a nonsuit was discharged.

Maule, J., said, "Upon the delivery of the goods to the defendants to be delivered to the plaintiffs, and the defendants' acceptance of them upon those terms, the property vested in the plaintiffs, who had an interest in them, viz., the interest of persons with whom the goods were pledged. And this view of the case is strongly supported by the decision of the Court of Exchequer in *Bryans* v. *Nix* (*d*). It is clearly competent to a man to sell goods to another, and to vest in him the property, though the goods are not present. It is admitted that the plaintiffs' right to recover would have been indisputable had the relation between Clapham (the consignor) and the plaintiffs been that of vendor and vendees, instead of pawnor and pawnees. But the goods having been shipped by Clapham to the order of the plaintiffs upon their acceptance of the 500*l* bill, and the defendants having received them for the purpose of being

(*c*) 4 Scott, N. R. 43.
(*d*) 3 M. & W. 15.

delivered to the plaintiffs, and Clapham not having revoked the consignment, it appears to ★ me that the plaintiffs ac- [★ 466] quired such an interest in the property and right to the possession as to entitle them to maintain trover against the defendants." The case of *Haillè* v. *Smith* (*e*) bears a resemblance to *Evans* v. *Nichol.* A., of Liverpool, wishing to draw upon the banking-house of B. in London, agreed, among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking-house, though under the firm of B. and C. Accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to B. and C., but the cargo was prevented from leaving Liverpool by an embargo. A. then became bankrupt, being considerably indebted to B., and the cargo was delivered to his assignees by the captain. It was held that B. and C. might maintain an action for the cargo against the captain. In *Kinloch* v. *Craig* (*f*), *Bruce* v. *Wait* (*g*) and *Nichols* v. *Clent* (*h*), there was no documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier.

(*e*) 1 B. & P. 563.
(*f*) 3 T. Rep. 783.
(*g*) 3 M. & W. 15.
(*h*) 3 Price, 547.

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★CHAPTER VII.

THE RIGHTS OF THE PRINCIPAL AGAINST THIRD PARTIES.

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Division of subject]—The rights of a principal against third parties may be distributed under the following heads:

(a) The right to sue upon the contracts, and to take advantage of the acts of his agent.

(b) The right to recover money wrongfully paid or applied by the agent.

[★ 468] (c) The right to recover goods wrongfully conveyed or pledged.

(d) The right to rescind contracts affected by fraud of the agent and the other contracting parties.

SECT. 1—*The right to sue on Contracts of Agent.*

Qualifications of principal's right to sue on contracts of agent.]—Those acts or contracts of an agent which render the principal liable to third parties impose upon the third parties themselves a reciprocal obligation to the principal; and as the principal is liable to the burden of such acts or contracts, whether the agent had authority originally, or his acts have been duly ratified, so he is entitled to the rights and benefits arising from such contracts, and may enforce those rights by action.[1] The rights here mentioned are subject to two qualifications. The first, which is of universal application, whether the principal is known or undisclosed at the time the contract is entered into, is that the right of the principal is affected and modified by the declarations, misrepresentations, concealments and fraud generally of the agent acting within the scope of his authority.[2] The second, which is applicable to cases where the agent has been allowed to contract as principal with the third party without notice, is, that the principal, if he takes advantage of the agent's contract, must do so subject to all the equities and rights of which the other contracting party might avail himself in the transaction as against the agent, assuming the latter to have been a principal.[3] It may be here mentioned that the right of the principal to sue is not affected by the fact that the agent also is entitled to sue, or that the principal was undisclosed when the contract was made, or that the agent acts under a *del credere* commission, or that the other contracting party dealt with the agent without notice of the existence of a principal.

Sale by factor — Buyer's right of set-off—George *v.* Claggett.]—Lord Mansfield stated (*a*), as early as the year 1788, that the rule had long been settled that where a factor, dealing for a principal, but concealing that principal, delivered goods in his own name, the other contracting party has a right to con-

(*a*) Rabone *v.* Williams, 7 T. R. 360 n.

[1] Barry *v.* Page, 10 Gray (Mass.), 398; Bassett *v.* Lederer, 1 Hun. (N. Y.) 274; Isley *v.* Merriman, 7 Cush. (Mass.) 242; Brewster *v.* Saul, 8 La. 396; Lulver *v.* Bigelow, 43 Vt. 249; Nicholl *v.* Burke, 78 N. Y. 581; Frazier *v.* Erie Bank, 8 W. & S. (Pa.) 18; Conklin *v.* Leeds, 58 Ill. 178; Childers *v.* Bowen. 68 Ala. 221; Bryant *v.* Wells, 56 N. H. 153; State of Wisconsin *v.* Torinus. 26 Minn. 1; Gage *v.* Stimson, 26 Minn. 64; Stonewall Mfg. Co. *v.* Peek, 63 Miss. 342.

[2] Elwell *v.* Chamberlain, 31 N. Y. 611; Veazie *v.* Williams, 8 How. (U. S.) 134; Mut. Ben. Ins. Co. *v.* Cannon, 48 Ind. 264; Brown *v.* Hartford Fire Ins. Co., 117 Mass. 479; Southern Ex. Co. *v.* Palmer, 48 Ga. 85. Where one seeks to enforce a contract made by his agent, he is bound by the declarations of the agent made at the time, even though the agent exceeded his authority. Keough *v.* Leslie, 92 Pa. St. 424. This principle does not apply when such declarations were neither the inducement to the making of the contract nor part of the conditions. Merrick Thread Co. *v.* Phila. Shoe Co., 115 Pa. St. 314.

[3] Traub *v.* Milliken, 57 Me. 63; Taintor *v.* Prendergast, 3 Hill (N. Y.), 72; Leeds *v.* Marine Ins. Co., 6 Wheat. (U. S.) 565; Locke *v.* Lewis, 124 Mass. 1; Miller *v.* Sullivan, 39 Ohio St. 79; Miller *v.* Tea, 35 Md. 396; Conklin *v.* Leeds, 58 Ill. 178; Koch *v.* Willi, 63 Ill. 144; Peel *v.* Shepherd, 58 Ga. 365.

[★469] sider ★ him to all intents and purposes as the principal; and though the real principal may bring an action upon that contract against the purchaser of the goods, the latter may set off any claim he may have against the factor in answer to the demand of the principal. This principle, after having been frequently acted upon at Nisi Prius, was at length, in the year 1797, confirmed by the full Court of King's Bench. *George* v. *Claggett* (*b*), was a case which decided that, if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. The difficulty felt in applying the statute of set-off, and saying that the terms of the statute were satisfied, so as to say that the debt of the factor should for the purpose of the action be considered as the debt of the principal, was got over by a subsequent case (*c*), where it was held that the existence of the set-off without any knowledge of the agency entitled the debtor to set up as against the principal the defence of set-off as a *quasi* extinguishment, notwithstanding the words of the statute of set-off. Mr. Justice Willes in *Semenza* v. *Brinsley* (*d*), has pointed out that, in order to make a valid defence within the above rule, the defendant must show:

(1.) That the contract was made by a person whom the plaintiff had intrusted with possession of the goods.

(2.) That the person sold them as his own goods in his own name, as principal, with the authority of the plaintiff.

(3.) That the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued.

Hence, if the buyer is dealing with a known agent, the principle laid down in *George* v. *Claggett* does not apply, although the buyer does not know at the time who is the particular principal (*e*). The principles stated by Mr. Justice Willes in *Semenza* v. *Brinsley* were accepted by the Court of Common Pleas in 1873 (*f*).

[★470] ★ *Knowledge of buyer the important inquiry.*]—In *Borries* v. *The Imperial Ottoman Bank*, which was decided in 1873, there was a count for goods sold and delivered. To this the defendants pleaded that the goods were sold and delivered to them by Scheitlin and Co., then being the agents of the plaintiffs, and that Scheitlin and Co. sold the goods in their own name, and as their own goods, with the consent of the plaintiffs; that at the time of the sale the defendants believed Scheitlin and Co. to be the owners of the goods, and did not know that the plaintiffs were the own-

(*b*) 7 T. R. 359.
(*c*) Carr *v.* Hinchliff, 4 B. & C. 547.
(*d*) 18 C. B., N. S. 477; 34 L. J. C. P. 191.
(*e*) *Ibid.*
(*f*) Borries *v.* Imperial Ottoman Bank, L. R., 9 C. P. 38; 43 L. J., C. P. 8.

ers of or interested therein, or that Scheitlin and Co. were their agents; and that before the defendants knew that the plaintiffs were the owners of the goods, or that Scheitlin and Co. were agents in the sale thereof, Scheitlin and Co. became indebted to the defendants, who claimed a set-off. The plaintiffs replied that before the sale the defendants had the means of knowing that Scheitlin and Co. were merely apparent owners of the goods, and that the same were intrusted to Scheitlin and Co. merely as agents, and that Scheitlin and Co. were agents, and as such sold the goods to the defendants. The court held that the plea was good, and the replication no answer to it.

Coleridge, C. J., said, "The essence of the defence is, the real state of the defendants' mind when they bought the goods of Scheitlin and Co. They assert that it was this, that they believed the goods to be the goods of Scheitlin and Co., and did not know or believe that the plaintiffs were the owners of or interested in them. That brings the case distinctly within the rule in *George* v. *Claggett;* and that is the form of plea which has been commonly in use to raise a defence of this kind. I observe that in two cases—*Purchell* v. *Salter* (*g*) and *Semenza* v. *Brinsley* (*h*)—where the plea contained an averment that the defendant had no means of knowledge, no notice is taken of that allegation in the judgment. If it be necessary to aver that the defendants had not notice that the plaintiffs were the owners of the goods, I think that is substantially averred in this plea by the statement that Scheitlin and Co., with the consent of the plaintiffs, sold the goods as their own, and that the defendants believed them to be the owners of them, and did not know that the plaintiffs were the real owners."

★ *Statement of the law by the Court of Appeal.*]—The [★471] above decisions of the Court of Common Pleas were reviewed by the Court of Appeal in 1876, when the latter court decided that a person purchasing goods from a factor, who sells them in his own name, can set off a debt due to him from the factor personally, in the same way as if the factor was the plaintiff, unless the purchaser has notice that the factor is not the principal; and that this right is not affected by the fact that the factor, in selling in his own name without disclosing the agency, is acting in contravention of the express directions of his principal (*i*). Brett, J. A., explained that the statement by Willes, J., in *Semenza* v. *Brinsley*, was to the effect that it must be shown that the agent acted with the authority of his principal. This statement was due to the circumstance that he was dealing with the demurrer. Such authority is shown when the facts prove that the agent is intrusted as a factor. "Now," said his lordship, "the rule of law is, that the extent of an agent's

(*g*) 1 Q. B. 197.
(*h*) 18 C. B., N. S. 467.
(*i*) *Ex parte* Dixon, *Re* Henley, L. R., 4 Ch. Div. 133; 46 L. J., Bank. 20.

authority, as between himself and third parties, is to be measured by the extent of his usual employment. That being so, the very fact of intrusting your goods to a man as a factor, with right to sell them, is *primâ facie* authority from you to sell them in his own name. Therefore, it not being shown here that any limitation of that authority was made known to the person who was dealing with the agent, there is sufficient evidence, as between the principal and such third party, that the goods were to be sold by the agent in his own name as principal, with the authority of the person who so intrusted him with the goods. That point, therefore, is made out. It is true that Mr. Justice Willes, in *Semenza* v. *Brinsley*, states it to be necessary that the agent should have the authority of the principal for selling in his own name; but he was only dealing with a demurrer to a plea; and, at the end of the judgment, he says it was a great pity that the parties did not go on to try the facts; and, if the facts had been tried, I have no doubt that as soon as he found that the agent was intrusted with the goods as a factor, he would have held that that proved authority given to him by the principal to sell in his own name, so far as anybody was concerned to whom some limitation of his authority was not disclosed. It, therefore, is made out that the agent sold in his own name with the authority of [★ 472] ★ the principal. Another point taken in the argument was, that the person dealing should be shown to have believed that the agent was the principal in the transaction. Evidence to the effect that he dealt under such belief was given by the person dealing with the agent; but it was further argued that the former must be taken to have known the contrary, because the acceptances on former transactions showed on their face that the agent was dealing as an agent." The court, however, decided the latter point against the principal upon the facts. "The arguments of the appellant (the principal)," said James, L. J., "are founded on a private communication between the principal and his agent, and on the form of certain bills of exchange. As regards third parties, the powers of an agent are measured by the apparent scope of his authority, and cannot be limited by any private communication with him. Then as to the form of the bills of exchange, when I come to look at them, I think the argument amounts to nothing whatever, because, although there is something printed upon them as to agency, that is so written over with ink as to prevent anybody from noticing it." An attempt was made, on behalf of the principal, to limit the definition of the term factor to persons intrusted with goods from abroad. The attempt, it need scarcely be remarked, was unsuccessful.[1]

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[1] Where one buys from an agent the goods of his principal, under a misapprehension, not induced by the principal, that the goods belong to the agent, he cannot use as a payment or counter claim, on a suit by the principal for the value of such goods, a credit given by him to such agent on an individual

Carr v. Hinchliff (*j*) *George* v. *Claggett* (*k*), *Rabone* v. *Williams* (*l*), and similar cases, are explained on the principle that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence as he was entitled to at that time against the agent, the apparent principal (*m*). In an action on a charter-party for freight the defendant cannot set off a debt due to him from the plaintiff's alleged principal (*n*).

Principal's right paramount—Lien of agent, effect of.]—The right of the principal to sue is paramount to that of the agent, and in cases where either may bring an action, the former, by giving notice to the other contracting party, puts an end to the ★agent's [★ 473] right of action, except in cases where the agent has a lien upon the subject-matter of the action equal to the claim of the principal.[1] Thus, where a factor sold goods, and the principal took steps to recover the debt himself, Lord Ellenborough ruled that after the intervention of the principal the right of the factor to sue was gone, and that the debt was due to the principal in the same manner as if the sale had been made personally by him in the first instance (*o*). An instance of the exception to the rule is furnished by *Hudson* v. *Granger* (*p*), which was decided in 1821. There the owner of goods, being indebted to a factor in an amount exceeding their value, consigned them to him for sale. The factor, who was also similarly indebted to the defendant, sold the goods to him. The factor afterwards became bankrupt, and on a settlement of accounts between the defendant and the assignees, the defendant allowed credit to them for the price of the goods, and proved for the residue of his claim against the estate. The plaintiffs, the original

(*j*) 4 B. & C. 547.
(*k*) 7 T. R. 359.
(*l*) 7 T. R. 360 n.
(*m*) Tucker *v.* Tucker, 4 B. & Ad. 750.
(*n*) Osberg *v.* Bowden. 8 Ex. 852. As to the right to counter-claim, see the Judicature Acts and Rules.
(*o*) Sadler *v.* Leigh, 4 Camp. 195.
(*p*) 5 B. & Ald. 27.

debt of the latter. Brown *v.* Morris, 83 N. C. 251; Stewart *v.* Woodward, 50 Vt. 78.

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew that L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief in the subject whether they made this contract on their own account or for a principal :— *Held*, affirming the decision of the Court of Appeal, that C. could not in an action brought by the principal, for the price of the cotton, set off a debt due from L. & Co.; Cooke *v.* Eshelby, 12 App. Ca. 271 (1887). This case is "not only important but open to serious criticism." Law Quarterly Review, (April, 1888), 219.

[1] Frazier *v.* Erie Bank, 8 W. & S. (Pa.) 18; see Corliss *v.* Cumming, 6 Cow. (N. Y.) 181.

owners of the goods, brought an action against the vendee for the price; but the court held that, as the factor had a lien on the whole price of the goods, the settlement of accounts between the vendee and the assignees afforded a good answer to the action.

Statement of the case by Holroyd, J.—Bankruptcy of the factor.] —Mr. Justice Holroyd summarized the law thus: "In *Drinkwater* v. *Goodwin* (*q*) it was expressly decided that a factor who becomes surety for a principal has a lien on the price of the goods sold by him for his principal in the amount of the sum for which he becomes surety; and Mr. Justice Chambre, in *Houghton* v. *Matthews* (*r*), considers that settled law. Clark (the factor) therefore, having a lien on the proceeds, had a right to receive the price from the buyer, and, when he had so received it, to retain it against Hallowell (the consignor). The bankruptcy of Clark could not operate to destroy his right of lien, though it would operate as a revocation of his authority to receive any money on behalf of his principal. His assignees, after the bankruptcy, had the same rights as the bankrupt had before. Assignment made to Clark before his bankruptcy, even against the will of Hallowell, would have operated as a valid payment as against Hallowell, and a payment to his assignees afterwards must have the same effect."

[★474] ★*Right of undisclosed principal to sue "subject to equities."*]—By the law of England an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which, without notice, may exist against the agent (*s*).[1] If the owner of goods allows the broker through whom he sells them to sell them as a principal, the buyer of goods so sold is discharged by payment to the broker in any way which would have been sufficient had he been the real owner (*t*). "A broker," remarked Lord Ellenbrough, "after having made the contract of sale, cannot vary the terms of it; but in this case the person employed to sell, himself acted as a principal, and the plaintiff, knowing this, authorized his mode of dealing, and all its consequences" (*u*). To a similar effect it has been said that a broker, with an undisclosed principal, may vary the terms of payment after the sale is completed. The principal may interfere at any time before payment, but not to rescind what has been before done. But if a man sells goods, acting as a broker, the moment the sale is completed he is *functus officio*. The terms of the contract cannot then be altered except by the authority of the principal (*x*).

Application of the right: its limitation.]—It is a well-established

(*q*) Cowp. 251.
(*r*) 3 B. & P. 489.
(*s*) Per Curiam, Browning *v.* Provincial Insurance Company of Canada, L. R. 5 P. C. 279.
(*t*) Coates *v.* Lewes, 1 Camp. 444.
(*u*) *Ibid.*
(*x*) Per Lord Ellenborough, Blackburn *v.* Scholes, 2 Camp. 341.

[1] See note 3, page 468, *ante*.

rule of law that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it. If the principal sues, then the defendant is entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases (*y*), but not to the case of a broker who had neither the documents of title to the goods nor the possession of the goods (*z*). Hence where a broker sells goods without disclosing the name of his principal, and in so doing exceeds his authority, the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal (*a*). The real ground upon which this and similar decisions ★ rest is that where a [★ 475] principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or statute, payment or set off, as he was entitled to at that time against the agent, the apparent principal (*b*). The rule that an undisclosed principal may take advantage of the contract entered into by his agent applies to policies of marine insurance, even when no assignment clause is inserted (*c*). When a written contract has been entered into by an agent in his own name, the undisclosed principal is entitled to sue upon it, although it sets out that the agent agrees to pay a sum of money by a cheque upon his own bankers (*d*).

The right not affected by rules of the Stock Exchange.]—The rule that a principal may sue upon a contract entered into on his behalf by an agent, although his name was concealed at the time of the contract, is not affected by the rules of the Stock Exchange, the effect of which is to make all stockbrokers principals as between themselves, but not to take away the right of a principal to sue in respect of his own right in his own name (*e*), or to free an undisclosed principal from liability (*f*).

Effect of notice of agency.]—The mere fact that persons have notice that a party contracting with them in his own name is a factor, is not enough to deprive them of the rights they have derived from his actually selling goods as a principal. A man who is in the habit of selling the goods of others may likewise sell goods as his own;

(*y*) Per Curiam, Sims *v.* Bond, 5 B. & Ad. 389.
(*z*) Baring *v.* Corrie, 2 B. & Ald. 137.
(*a*) *Ibid.*
(*b*) Per Curiam, Osberg *v.* Bowden, 8 Ex. 852.
(*c*) Browning *v.* Provincial Insurance Company of Canada, L. R., 5 P. C. 263.
(*d*) Phelps *v.* Prothero, 16 C. B. 370.
(*e*) Langton *v.* Waite, L. R., 6 Eq. 165.
(*f*) Mortimer *v.* M'Callan, 6 M. & W. 58.

and where he sells goods as a principal with the sanction of the real owner, the purchaser who is thus led to give him credit will not be deprived of his set-off by the intervention of any third person.[1]

This rule, however, does not apply where the purchaser has express notice, before the completion of the contract, that the seller acted only as factor (*g*). *Mildred* v. *Maspons* (*h*) was decided by the House of Lords in 1883. Merchants in London, upon the in- [★ 476] struction of shipping agents at Havannah with ★ respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, affected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged, and the London *merchants, before affecting the policies, had notice that the Havannah* agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals. An action was brought by the latter against the London merchants for the policy moneys. Manisty, J., had given judgment for the defendants. This was reversed by the Court of Appeal. The House of Lords affirmed the judgment of the Court of Appeal, holding that the action lay, and that the defendants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything except the premiums, stamps and commission in respect of the insurance. Lord Selborne thought that the notice given to the defendants before they acted decided the case. Lord Blackburn was of that opinion too, though his lordship was also of opinion that the case was governed by 6 Geo. IV. c. 94, s. 1. But a person who contracts as agent cannot afterwards sue as principal, without giving notice to the other contracting party that he is the real principal (*i*). The remarks in *Maspons* v. *Mildred* (*k*) on *The New Zealand Land Co.* v. *Watson* (*l*), must be understood as applying to the facts of that case, and not as throwing any doubt on the right of an owner of goods to follow them so long as they have not been properly sold (*m*).[2]

(*g*) Moore *v.* Clementson, 2 Camp. 22. (*h*) 8 App. Ca. 874.
(*i*) Bickerton *v.* Burrell, 5 M. & S. 383.
(*k*) 9 Q. B. D. 545. (*l*) 7 Q. B. D. 374.
(*m*) *Per cur.* Kaltenbach *v.* Lewis, 24 Ch. D. 54; 51 L. J. Ch. 881.

[1] Where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set off, as he was entitled to at that time against the agent—the apparent principal. Miller *v.* Lea, 35 Md. 396.

[2] The decision in this case was affirmed in the House of Lords. Mildred *v.* Maspons, 8 App. Ca. 874.

Cornfoot *v.* Fowke *examined.*]—The proposition that the right of a principal to sue upon contracts entered into by his agent may be modified by the declarations, misrepresentations, concealment, and fraud generally of the agent, is sometimes said to be qualified in its turn by the decision of the Court of Exchequer in *Cornfoot* v. *Fowke* (*n*), which has been thought to limit the ★ propo- [★477] sition to cases other than those where the principal is free from moral fraud. That decision, however, when carefully examined, it will be found, may be supported by the principle that oral evidence cannot be given to vary the terms of a written contract. The contract in that case was in writing; the representation upon which the defendant relied as an answer to the action was not embodied in the contract. Baron Rolfe admitted that if the plaintiff, knowing of the nuisance, expressly authorized the agent to state that it did not exist, or to make any statement of similar import; or if he purposely employed an agent ignorant of the truth, in order that such agent might innocently make a false statement, believing it to be true, and might so deceive the party with whom he was dealing, in either of these cases he would be guilty of a fraud, and the truth of the plea would then be established. This admission proceeds upon the principle, that a principal was not liable for the agent's fraud, unless the fraud was brought home to him. Baron Alderson laid stress upon what is conceived to be the true *ratio decidendi*, namely, that above stated—a view which Baron Parke also adopted. If the decision itself is thought to support the general proposition that a person who has been induced to enter into a contract by the fraud of the agent cannot set up such fraud as an answer to an action by the principal, provided the latter is innocent, it can no longer be considered as an authority (*o*)

Summary.]—The following propositions may be inferred from the authorities with respect to the right of a principal to sue upon the contracts of an agent:

(a) He may take advantage of all such contracts, whether his name has been disclosed or not, except

1. When the agent has contracted personally by deed (*p*);
2. When in a contract of sale the agent has a lien upon the subject-matter of the contract or its proceeds, exceeding or equal to the value, in this case the right of the agent is paramount to that of the principal (*q*);
3. When an exclusive credit is given to and by the agent (*r*).

★ If the plaintiff has given exclusive credit to an agent, [★478] and gives the agent a receipt as for money due from the prin-

(*n*) 6 M. & W. 358.

(*o*) See Wilson *v.* Fuller, 3 Q. B. 68, and per Willes, J., in Barwick *v.* English Joint Stock Bank, L. R., 2 Ex. 282.

(*p*) Appleton *v.* Binks, 5 East, 149; Tanner *v.* Christian, 4 E. & B. 591; Pickering's claim, L. R., 6 Ch. 525: Schack *v.* Anthony, 1 M. & S. 573.

(*q*) Hudson *v.* Granger, 5 B. & Ald. 27.

(*r*) Addison *v.* Gaudasequi, S. L. Cases and Notes.

cipal in consequence of which the principal deals with the agent on the faith of such receipt, the principal is discharged if he can show that he was injured by the plaintiff's conduct (*s*).

(b) This right of the principal, when it exists, is subject to the qualification,

1. Defences founded upon the fraud of the agent are equally valid against the principal (*t*);
2. Where the agent has been allowed to contract as principal without notice, the principal takes the contract subject to all the equities and rights of which the other contracting party might avail himself in the transaction as against the principal (*u*).

(c) *In respect of demand by agent.*]—Where an agent is authorized by his principal to make a demand upon a third person, and does make it, the principal cannot proceed as if there had been a refusal by the third person to comply with such demand, until the person of whom it is made has a reasonable time in which to inquire into the authority of the person making it (*x*). Thus, where by the terms of a mortgage deed the plaintiffs were to remain in possession on their own account, and manage the mortgaged property until they should make default in payment of the mortgage money upon demand in writing specified, and such demand was made on the wife of one of the plaintiffs, during the plaintiff's absence, by a person who represented himself as the defendant's agent and upon non-payment the defendant forthwith entered into possession and seized the mortgaged property, it was held in an action of trespass against the mortgagee that such non-payment before the plaintiffs had had an opportunity to inquire into the truth of the alleged agency did not constitute default, and that the defendant was liable to the mortgagors in substantial damages (*y*).

[★ 479] ★ SECT. 2.—*The Right of the Principal to recover Money wrongfully paid or applied.*

The right long-established.]—Lord Mansfield laid down the general rule, as early as the year 1778, to the effect that "where a man pays money by his agent which ought not to have been paid, either the agent or his principal may bring an action to recover it back.[1] The agent may, from the authority of the principal; and

(*s*) Wyatt *v.* Lord Hertford, 3 East, 147; and see Horsfall *v.* Fautleroy, 10 B. & C. 755.
(*t*) See Paley, 3rd edit. 235.
(*u*) *Ibid.*
(*x*) Moore *v.* Shelley, 8 App. Ca. 285.
(*y*) *Ib.;* and see per Cockburn, C. J., in Toms *v.* Wilson. 4 B. & S. 442.

[1] Farmers & Mechanics' Bank *v.* King, 57 Pa. St. 202; U. S. *v.* Bartlett, Davies (U. S.), 9; Bank of Kansas City *v.* Mills, 24 Kan. 604.

the principal may, as proving it to have been paid by his agent (*z*). Hence, if exorbitant fees are taken by a custom-house officer from the master of a vessel, the owners may bring an action to recover the excess (*a*)

Money paid for forged bill.]—In *Ancher* v. *The Bank of England* (*b*), decided in 1781, a specially indorsed bill of exchange, having been rendered negotiable by a forged indorsement was discounted by the defendant. An agent of the drawer having taken up the bill, the court held that the drawer might recover back the money so paid by his agent (*c*).

Payment to underwriter—Effect of his receipt, or acknowledgement.]—An underwriter who has acknowledged the receipt of premiums from an agent will not be allowed, in an action brought by the principal to recover back such money, to say that the agent never paid him. Accordingly, where the defendant had underwritten a policy of insurance effected by a broker on account of the plaintiff upon goods by ship or ships, he was not allowed, in an action brought to recover back the premium on the ground that the goods had never been shipped, to impeach the policy signed by himself, on which he acknowledged the receipt of the premium (*d*). In actions against an underwriter for a loss, an acknowledgment in the policy of the payment of the premiums is conclusive as between the assured and the underwriter; and the latter cannot, as a rule, set off the premiums, although they have never paid (*e*). It has been suggested, however, that if it had appeared on the face of the case that the underwriter had paid the losses and returns of premium to the assured through the medium of premiums ★ retained in the hands of the broker, there would be an [★ 480] answer to the action (*f*).

Payment of fiduciary into bank.]—If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands (*g*). In the case cited, the Court of Appeal held that if a person who holds money in a fiduciary character pays it to his account at his banker's and mixes it with his own, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's case* (*h*) attributing the first drawings out to the first payments in does not apply, and that the drawer must be taken to have drawn out his own money in preference to the trust money. *Pennell* v. *Deffell* was not followed, for the reason that although the

(*z*) Sadler *v.* Evans, 4 Burr. 1984; Stevenson *v.* Mortimer, Cowp. 805.
(*a*) *Ibid.* (*b*) 2 Doug. 637.
(*c*) See to the same effect Sigourney *v.* Lloyd, 8 B. & C. 622.
(*d*) Dalzell *v.* Mair, 1 Camp. 532.
(*e*) De Gaminde *v.* Pigou, 4 Taunt. 246.
(*f*) De Gaminde *v.* Pigou, 4 Taunt. 246.
(*g*) Knatchbull *v.* Hallett, 13 Ch. D. 696.
(*h*) 1 Mer. 572.

principle is rightly laid down in that case, it was not altogether rightly applied (*i*).

SECT. 3.—*The Right of the Principal to follow Property wrongfully conveyed or its Proceeds.*

The right well established.]—It is a well-established principle, that wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form, liable to the rights of the original owner or *cestui que trust* (*k*).[1]

(*i*) See per Jessel, M. R., *ib.* p. 729.
(*k*) Story, Eq. Jur., § 1258.

[1] In the case of the Farmers and Mechanics' Nat. Bank *v.* King, 57 Pa. St. 202, an agent had deposited money in his own name, which had been collected for, and belonged to his principal. Afterwards the agent suddenly disappeared. The question was whether the principal, having notified the bank of his claim and having directed it not to pay the money to the agent or to any person on his behalf, which notice, however, was subsequent to an attachment issued against the bank as garnishee, could compel the bank to hand over the funds to him.

In the opinion of the court, Strong J. said: "He (the agent) obtained it (the money deposited) as their agent, and he held it as such. It had been collected for them and deposited to the credit of their agent. Their right to it was not lost because thus deposited. It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands, if money has been converted by a trustee, or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability have been extinguished, in the absence of interference by his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to their agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor. If an agent receives money of his principal and lends it, taking a promissory note to himself, the note belongs to the principal, and the borrower may not pay the agent after he has been informed that there is a superior right, and has received notice not to pay the agent. This is a rule of general application. Story, in his treatise on equity, in section 1259, remarks: 'It matters not in the slightest degree into whatever other form different from the original the change may have been made, whether it be that of promissory notes or of goods or of stock, for the product or the substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such.'" 57 Pa. St. 204; Frazier *v.* Erie Bank, 8 W. & S. (Pa.) 18; Pierce *v.* McKeehan, 3 W. & S. (Pa.) 280; Harrisburg Bank *v.* Tyler, *id.* 373; Sheffer *v.* Montgomery, 65 Pa. St. 329; First Nat. Bank *v.* Bache, 71 Pa. St. 213; see Milligan's Appeal, 1 Norris (Pa.), 389; Meiggs *v.* Meigg, 15 Hun. (N. Y.) 453; Baker *v.* N. Y. Nat. Ex. Bank, 100 N. Y. 31; Schlaefer *v.* Corson, 52 Barb. (N. Y.) 510; Day *v.* Roth, 18 N. Y. 448; Kingman *v.* Pierce, 17 Mass. 247; Riley *v.* Wheeler, 44 Vt. 189; Barron *v.* Barron, 24 Vt. 375; Green *v.* Haskell, 5 R. I. 447; Church *v.* Sterling, 16 Conn.

Trust property in hands of factor or other agent—Specific remittance—Conversion]—Lord Holt ruled in 1708 (*l*), that trust property in the possession of a factor empowered to dispose of it for his principal did not pass to his assignees upon his becoming a bankrupt. Soon afterwards Lord Cowper came to the same decision (*m*). The doctrine was extended in *Whitecombe* v. *Jacob* (*n*), which was decided in 1711. In that case a factor entrusted with the disposal of merchandise for his principal sold ★ it, [★ 481] and received the money; and instead of paying the money to his principal vested the produce in other goods, and died indebted in debts of a higher nature, such as specialty debts. The Court of Chancery held that those goods should be taken as the merchant's estate, and not the factor's. The authority of this case at law was acknowledged by Willes, C. J., in *Scott* v. *Surman* (*o*). In *Ryall* v. *Roll* (*p*), the two latter cases are quoted, and Lee, C. J., accepts the principle that "things arising from the sale of other things follow the nature of the goods themselves." Again, Lord Mansfield decided (*q*) in 1763, that if an executor becomes bankrupt, the commissioners could not seize the specific effects of his testator, not even in money, which could be specifically distinguished and ascertained to belong to the testator, and not to the bankrupt. So in the case of specific remittances. The representatives could under the old bankrupt law be in no better position than the person whom they represent would have been (*r*). With respect to money which has been converted into land the same principles apply, the only difficulty being that of proof (*s*).

The right to follow ceases when the means of ascertainment fail—Ear-marked money.]—The judgment of Lord Ellenborough in *Taylor* v. *Plumer* (*t*), 1815, contains an able exposition of this branch of law. This was an action in trover brought by the assignees of one Walsh, a stockbroker, to recover certain valuable securities from

(*l*) In L'Apostre *v.* Plaistrier (cited, 1 P. Wms. 318).
(*m*) Copeman *v.* Gallant, 1 P. Wms. 320.
(*n*) Salk. 160.
(*o*) Willes, 400.
(*p*) 1 Atk. 172.
(*q*) Howard *v.* Jemmett, 3 Burr. 1369.
(*r*) *Ex parte* Chion, 3 P. Wms. 187 n., and Hassall *v.* Smithers, 12 Ves. 119.
(*s*) Per Lord Hardwicke in Lane *v.* Dighton, Amb. 409; see Lench *v.* Lench, 10 Ves. 517.
(*t*) 3 M. & S. 562.

388; Bertholf *v.* Quinlan, 68 Ill. 297; Norris *v.* Taylor, 49 Ill. 17; King *v.* Hamilton, 16 Ill. 190; Pugh *v.* Pugh, 9 Ind. 132, Thompson *v.* Barnums, 49 Iowa, 392; Neely *v.* Rood, 19 N. W. Rep. (Mich.) 920; Third Nat. Bank *v.* Stillwater Gas Co., 30 N. W. Rep. (Min.) 440; Turner *v.* Pettigrew, 6 Hump. (Tenn.) 438; Hill *v.* Coolidge, 33 Ark. 621; Preston *v.* McMillan, 58 Ala. 84; Dyer *v.* Jacoby, 42 Ark. 186; Marsh *v.* Marsh, 43 Ala. 677; Harper *v.* Archer, 28 Miss. 212; Chastain *v.* Smith, 30 Ga. 96; United States *v.* State Bank, 96 U. S. 30; see Burnham *v.* Holt, 14 N. H. 367, and Ill. Trust & Sav. Bank *v.* First Nat. Bank, 15 Fed. Rep. 858.

the defendant. The facts stated were that the defendant intrusted the broker with money for the purchase of exchequer bills. This money the broker had misapplied by buying American stock and bullion. He afterwards absconded, but having been taken before he had left England, he gave up to the defendant the securities for the stock and the bullion. The broker became bankrupt on the day on which he misapplied plaintiff's money. The court held, in a considered judgment, that the defendant was entitled to retain the proceeds of the securities as against the plaintiffs. Lord Ellenborough, who delivered the judgment of the court, said, "Upon a view of the authorities and consideration of the arguments, it should [★ 482] seem ★ that if the property in its original state and form was conveyed with a trust in favour of the plaintiff, no change of that state and form can divest it of such trust, or give the factor or those who represent him in right any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no right on the party abusing it, nor on those who claim in privity with him." His lordship went on to say that the defendant's counsel was obliged to contend that if A. is trusted by B. with money to purchase a horse for him, and he purchases a carriage with that money, B. is entitled to the carriage, and continued, "If he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument. It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the plaintiff, as in *Scott* v. *Surman* (*u*), or into other merchandise as in *Whitecomb* v. *Jacob* (*x*); for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, *i. e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so), for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains (as the property in question did) in the hands of the factor or his general representatives."

Sale of trust stock and re-investment by broker—Bankruptcy of broker before settling day.]—This case was the subject of much discussion in the Court of Appeal in 1876, in *Ex parte Cooke, Re*

(*u*) Willes, 400.
(*x*) Salk. 160.

Strachan (*y*). There a trustee employed a broker to sell trust ★ stock and invest the proceeds in railway shares on be- [★ 483] half of the trust estate. The broker had full notice that the stock in question was trust stock. He sold for cash and bought the railway shares to the same amount for the settling day. The price of the trust stock was received in a cheque, which the broker paid in to his account at his bankers. Before the arrival of the settling day he stopped payment and went into liquidation, and the trustee claimed so much of the broker's balance at his bankers as arose from the proceeds of the trust stock. The claim was disallowed by the registrar on the ground that the relation between broker and customer was similar to that between banker and customer. This decision was reversed on appeal by James, L. J., Sir Richard Baggallay, and Sir Geo. Bramwell. *Taylor* v. *Plumer* (*z*) was relied on for the appellant. All the learned judges agreed that this case was an authority to be acted upon in the case before the court, but Sir Richard Baggallay would express no opinion how the latter case would have stood if the money had not been trust money, or if the broker had received it without any notice of the fact. The other two learned judges, however, were clear that, apart from the question of trust, the position of a broker was that of an agent into whose hands money is put to be applied in a peculiar way. "The money arising from the sale," said James, L. J., "is trust money, and by no bargain between A. (the plaintiff) and the broker, nor by any rule of the Stock Exchange, can it be made anything but trust money liable to be followed as such. Even had there been no such trust, it appears to me that the case must have been decided in favour of the appellant, for I cannot find any distinction between this case and *Taylor* v. *Plumer*." The fact that the payment was made by cheque did not prevent the property being followed.

Taylor *v.* Plumer *and* Ex parte Cooke *examined.*]—It is clear that the judgment of the Court of Appeal in *Ex parte Cooke* does not rest upon the same *ratio decidendi* as that in *Taylor* v. *Plumer*, and the question may be raised at a future time whether the statement of the law by Lord Ellenborough should be accepted in its entirety. With the strong *dicta* of James, L. J., and Sir Geo. Bramwell in its support, it will probably be accepted. In *Ex parte Cooke* there was a double trust. The person who ★ em- [★ 484] ployed the broker was himself a trustee of the property in question. But, irrespective of this consideration, the duties devolving upon the broker were, from the very nature of his employment, analogous to those of a trustee with respect to that property. It is submitted that the first consideration is immaterial. Referring to the case of *Taylor* v. *Plumer* (*z*), it was pointed out by Sir Geo. Bramwell that the bonds were not the property of Plumer by reason of his having ordered them to be purchased, and they could

(*y*) L. R., 4 Ch. Div. 123.
(*z*) *Supra.*

only be held to belong to him because they were bought with his money; hence the conclusion that if the broker had been caught with the money upon him, the defendant could have claimed it. He could have claimed it "because the money was paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal." This was not necessary to be stated for the decision of *Ex parte Cooke*. It goes, however, fully to an affirmance of *Taylor* v. *Plumer*.

Payment by cheque—Does not prevent money being traced.]—Sir Geo. Bramwell, having dwelt upon a difficulty in tracing money, viz., that difficulty which arises from the circumstance that payments now are not usually made in gold, but by cheques which go into a banking account, so that the sum is mixed up with the other moneys of the customer, went on to say, "If this payment were made by a bag of gold which the broker put into his strong box, and then misapplied part of the money, leaving the rest in the bag, there would be no doubt that what was so left could be claimed as the money of the client. The use of cheques may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the client, appears to me to be covered both by the reason of the thing and by the authority of *Taylor* v. *Plumer*."

Investments by solicitor in unauthorised security—Composition paid in respect of same.]—Similarly, it is well established that if a client intrusts money to a solicitor for the purpose of investment of a particular kind, and he invests it in an unauthorized security, he is bound to repay it just as if it still remained in his [★ 485] ★ hands uninvested; and if he replaces it he is entitled to the benefit of his supposed rotten security. The fact that the solicitor pays only a composition makes no difference. If he becomes bankrupt and pays so much in the pound, and the security afterwards proved sufficient, his trustee will have the same equity to have the dividend returned (*b*). In *Sawyer* v. *Goodwin* a solicitor invested money of a client on an improper security (a fourth mortgage). The security was supposed to be worthless, and the solicitor absconded. The client thereupon received a composition of five shillings in the pound from the estate of a deceased partner of the solicitor. The mortgaged estate subsequently proved sufficient to pay the fourth mortgage, and the Court of Appeal, reversing the decision of Hall, V.-C., held that the amount received under the composition must be repaid to the partner's estate, and did not enure to the benefit of subsequent incumbrancers on the mortgaged property. The following cases may also be referred to *Re Hal-*

(*b*) Per Mellish, L. J., Sawyer *v.* Goodwin, 45 L. J., Ch. 289; L. R., 1 Ch. Div. 351.

lett's Estate (*c*); *Carr* v. *London & N. W. Ry. Co.* (*d*); *Harris* v. *Truman* (*e*); *Spence* v. *The Union Marine Ins. Co.* (*f*); *Ex parte Hardcastle* (*g*); *Ex parte Kingston, Re Gross* (*h*); *Middleton* v. *Pollock* (*i*).

Defences founded upon the Factors Acts.]—The defence of most frequent occurrence in actions to recover property which has been disposed of without authority is that founded upon the Factors Acts.[1] The law with respect to the power of a person in possession of goods or documents of title to goods belonging to another, to bind the owner by a sale or pledge of such goods, without or contrary to instructions, has five well-defined stages. These stages are marked by the innovations made by the legislature from time to time upon the common law rules.

(a.) The common law rules were in full force until the year 1823.

(b.) On the 18th July, 1823, the first Factors Act was passed. (4 Geo. 4, c. 83).

(c.) On the 5th July, 1825, another act was passed (6 Geo. 4, c. 94) to amend the law.

(*c*) 13 Ch. Div. 696—707.
(*d*) L. R., 10 C. P. 307—316.
(*e*) 7 Q. B. D. 340.
(*f*) L. R., 3 C. P. 427, 437.
(*g*) 29 W. R. 615; 44 L. T. 523.
(*h*) L. R., 6 Ch. Ap. 632.
(*i*) 4 Ch. Div. 49.

[1] Factors acts have been passed in some of the United States. 2 Kent's Com. 628 note b. In New York by act of April 16, 1830, entitled "An act for the amendment of the law relative to principals and factors or agents." See revised statutes of the State of New York 1852, Vol. 2 page 184.

The case of Jennings *v.* Merrill, 20 Wend. 1, was decided under this act. It held that a contract of sale by a factor or agent, entrusted with goods for the purpose of sale, is valid and will protect a purchaser against the principal, although no money is advanced, or negotiable instrument or other obligation given at the time of the contract; and that it is enough if an obligation be subsequently entered into on the faith of the contract, at any time whilst it remains unrescinded; and accordingly held that a subsequent endorsement of a promissory note, in anticipation of which the property was transferred, gave effect to the contract.

For other cases under the act, see Mechanics and Traders' Bank *v.* Farmers and Mechanics' Bank, 60 N. Y. 40; Howland *v.* Woodruff, 60 N. Y. 73; Bank of Toledo *v.* Shaw, 61 N. Y. 283; Marine Bank *v.* Fisk, 71 N. Y. 353; Comer *v.* Cunningham, 77 N. Y. 391; Hazard *v.* Fisk, 83 N. Y. 287. A similar Act was passed in Pennsylvania, Act of 14 April, 1834, P. L. 375; Purdon's Digest, page 772. See Porter *v.* Patterson, 15 Pa. St. 229; Brown *v.* McGran, 14 Pet. (U. S.) 479.

In Macky *v.* Dillinger, 73 Pa. St. 85. A consigned goods to B. and B. pledged them for a loan to C., who knew they were owned by A. It was held that under the Factors' Act A. could recover in replevin without tendering repayment of the loan. In this case the Factors' Act is construed. Also in Massachusetts, see Public Statutes of Massachusetts, page 417. chap. 71. See Michigan State Bank *v.* Gardner, 15 Gray, 364; Stevens *v.* Cunningham, 3 Allen, 491; Nickerson *v.* Darrow, 5 Allen, 419; Stollenwerck *v.* Thatcher, 115 Mass. 224.

(d.) On the 30th June, 1842, a further act (5 & 6 Vict. c. 39) [★ 486] ★ was passed for the better protection of persons who deal with agents intrusted with the possession of goods or documents of title to goods.

(e.) The Act of 1877.

The rule at common law—Sales and pledges—Market overt.]—At common law, it has been said by a learned judge, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had.[1] To this general rule there was an exception of sales in market overt,[2] and an apparent exception where the person in possession had a title defeasible on account of fraud.[3] But the general rule was that to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority from the owner to sell or pledge, as the case may be. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who acted *bonâ fide* on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. The possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater

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[1] Barker *v.* Dinsmore, 72 Pa. St. 427; Saltus *v.* Everett, 20 Wend. (N. Y.) 267; Decan *v.* Shipper, 11 Casey, 239.

[2] This exception has not been adopted in the United States. See Bryan *v.* Whitcher, 52 N. H. 158; Darne *v.* Baldwin, 8 Mass. 518; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 479; Easton *v.* Worthington, 5 S. & R. (Pa.) 130; Sanborn *v.* Kittredge, 20 Vt. 640; Symonds *v.* Hall, 37 Me. 358; Baggs *v.* Fowler, 16 Cal. 559.

[3] Fraud in the purchase of the property does not render the sale void, but it is voidable at the option of the party defrauded. And where a person purchases and acquires the possession of property by fraudulent means, and sells it to a *bonâ fide* purchaser without notice, the latter acquires title thereto before the sale is avoided and the property is reclaimed. Michigan Cent. R. R. *v.* Phillips, 65 Ill. 191. To the same effect; The Chicago Dock Co. *v.* Foster, 48 Ill. 507; O. & M. R. R. Co. *v.* Kerr, 49 Ill. 459; Martin *v.* Mathiot, 14 S. & R. (Pa.) 214; Rose *v.* Story, 1 Pa. St. 190; Smith *v.* Lynes, 1 Seld. (N. Y.) 42. But the contrary is held in some of the other States; as in Massachusetts, where it is held that a sale and delivery of goods upon condition that the title shall not pass till the payment of the price gives the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration. Deshon *v.* Bigelow, 8 Gray. The same is held in Maine and New Hampshire. Sawyer *v.* Fisher, 32 Me. 28; Sargent *v.* Gile, 8 N. H. 225.

effect at common law than the transfer of the actual possession (*k*). At common law it was held that a pledge by a factor did not even transfer the lien which the pledgor himself had (*l*).

Apparent authority the real authority so far as relates to third persons.]—It is, then, a general principle of the common law, that where the true owner has clothed anyone with apparent authority to act as his agent, he is bound to those who deal with the apparent agent, on the assumption that he really is an agent ★ with [★ 487] that authority, to the same extent as if the apparent authority is real.[1]

Sale by broker.]—In *Pickering* v. *Busk* (*m*), which was decided in 1812, the plaintiff, the true owner, had bought goods through S., who was a broker and agent for sale. At the plaintiff's desire, the goods were transferred in the name of S., who afterwards sold them. In an action to recover the goods, Lord Ellenborough ruled that the transfer by the plaintiff's direction authorized S. to deal with them as owner with respect to third persons, and that the plaintiff, who had enabled S. to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict for the defendant was upheld by the full court. A careful reading of the opinions of the several judges shows that the judgment of the court was based upon the fact that it was a reasonable inference, from the circumstances that S. had implied authority to sell. Lord Ellenborough's remarks go further. His lordship, however, qualified them by saying, "If a person is authorized to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." When the case of *Wilkinson* v. *King* (*n*) was cited on behalf of the plaintiff, he remarked, "that was the case of a wharfinger, whose proper business it was not to sell, and to whom the goods were sent for the mere purposes of custody."

Sale by wharfinger.]—In *Wilkinson* v. *King*, one Ellit, a wharfinger was accustomed to sell lead from his wharf. It does not clearly appear whether these sales were of his own lead or not, but he had never sold lead for the plaintiff. The defendant bought of Ellit lead which had been sent to him by the plaintiff, as wharfinger, and Lord Ellenborough ruled, that "Ellit had no colour of authority to sell the lead, and no one could derive title from such tortious conversion."

Object of the Factors Acts.]—It was not the intention of the legislature, in passing the Factors Acts, to give to all sales and

(*k*) Per Mr. Justice Blackburn, Cole *v.* North Western Bank, L. R., 10 C. P. 354.
(*l*) M'Combie *v.* Davies, 7 East, 5.
(*m*) 15 East, 38.
(*n*) 2 Camp. 335.

[1] Henry *v.* Phila. Warehouse Co., 81 Pa. St. 76; West. Union R. R. *v.* Wagner, 65 Ill. 197; Nixon *v.* Brown, 57 N. H. 34.

pledges in the ordinary course of business the effect which the common law gives to sales in market overt. The intention was to make it law that when a third person has intrusted goods, or the documents of title to goods, to an agent who, in the course of such agency, sells [★ 488] or pledges the goods, he should be deemed ★ by that act to have misled anyone who deals *bonâ fide* with the agent, and makes a purchase from, or an advance to, him without notice that he was not authorized to sell or procure the advance. It was not, however, intended to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them (*o*). For instance, if A. deposits his goods for safe keeping with B., who, in addition to being a bailee, is also a factor; or if A. pledges his goods to B., there is no intrusting to B. within the statute (*p*).

Common law unaffected by Factors Acts.]—The provisions of the Factors Acts are in part confirmatory of the common law, and in part alterations of that law. The rules of common law relating to unauthorized sales or pledges, which have not been affected by those acts, are those relating to

1. Sales in market overt.

2. Sales or pledges by one, not the owner, under circumstances from which the acquiescence of the owner might reasonably be inferred.

Provisions of 4 Geo. 4, c. 83—Pledges by consignees.]—The first change in the common law was made in 1823 (4 Geo. 4, c. 83), when it was enacted that where goods were shipped in the names of persons "intrusted for the purposes of sale" with goods, the consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary. It was also provided that the persons in whose names such goods are so shipped, shall be taken to have been intrusted with them, unless the contrary "appears or be shown in evidence by any person disputing the fact" (sect. 1). It was also made lawful for any person to take goods or bills of lading in deposit from a consignee, but the rights transferred were not to exceed those possessed by the consignee (sect. 2). This act did not alter the law as to pledging, except in the the case of pledges by consignees. The provisions of this act were incorporated in, and extended by, an act passed about two years afterwards (6 Geo. 4, c. 94).

Sales and pledges by agents generally.]—The strictness with which the rules of common law relating to unauthorized sales [★ 489] ★ and pledges by agents were construed, gave rise to a number of enactments which were intended to protect persons who dealt *bonâ fide* with agents intrusted with goods or documents of title to goods.[1] In *Dyer* v. *Pearson* (*q*), decided in 1824, which

(*o*) See Cole *v.* North Western Bank, L. R., 10 C. P. 372.
(*p*) See *per* Coltman, J., in Baines *v.* Swainson, 32 L. J., Q. B. 281.
(*q*) 3 B. & C. 38.

[1] See Mackey *v.* Dillenger, 73 Pa. St. 85, a case in which there was notice.

was an action to recover a quantity of wool, A., who had sold the wool to the defendant, had been intrusted by the plaintiffs with the bill of lading, for the purpose of wharehousing the goods. He did so in his own name. There was no distinct evidence that A. was in the habit of buying and selling wool for others, nor had he any authority from the plaintiffs to sell. At the trial, Abbott, C. J., left it to the jury to say whether the defendant had bought the wool under circumstances which would have induced a cautious man to believe that A. had authority to sell. The jury found for the defendant. A new trial was granted, and Abbott, C. J., who delivered the judgment of the court, said, "I ought either to have told the jury that even if there was an unsuspicious purchase by the defendant, yet as A. had no authority to sell, they should find their verdict for the plaintiffs, or should have left it to the the jury to say whether the plaintiffs had by their own conduct enabled A. to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the *indicia* of property, then, perhaps, a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant, and that question, if it arises, ought to have been submitted to the jury." This case is useful as throwing light upon the intention of the legislature in passing 6 Geo. 4, c. 94 (*r*).

Provision of 6 Geo. 4, c. 94.]—The first section of 6 Geo. 4, c. 94, provides that—Any person intrusted for the purpose of consignment or of sale with any goods, and who ships the goods in his own name, and any person in whose name any goods shall be shipped by another person, shall be deemed to be the true owner, so as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced or given by him to or for the use of the person in whose name the goods are shipped, or in respect of any money or negotiable security ★ received by the latter to the use of [★490] the consignee, provided (1) the consignee has no notice, at or before the time of any such advance or receipt, that the person in whose name the goods are shipped is not the true owner; and (2) the person in whose name the goods are shipped shall be taken to be intrusted therewith for the purpose of consignment or of sale, unless the contrary appear.

Wharfingers, carters, warehousemen, packers, not agents intrusted with goods within above act.]—*Monk* v. *Whittenbury* (*s*), decided in 1831, was one of the earliest decisions after the passing of 6 Geo. 4. c. 94. There C., who was both a flour factor and a wharfinger, received, in his character of wharfinger, a quantity of flour from the plaintiff. He sold a part of it to the defendant, and the plaintiff

(*r*) See *per* Blackburn, J., in Cole *v.* North Western Bank, L. R., 10 C. P. 365.

(*s*) 2 B. & Ad. 484.

brought an action to recover the value. Lord Tenterden, before whom the cause was tried, was of opinion that if the sale in question was made by an agent in the ordinary course of business to a person who was not aware at the time that such agent was unauthorized to sell, the purchaser was protected by 6 Geo. 4, c. 94, s. 4, and he left it to the jury to say whether or not the sale was in the ordinary course of business. The jury found that it was not. Upon a motion for a new trial his lordship touched upon the difficulty of defining who was an agent intrusted with goods within the meaning of the act, but he was clear that a wharfinger was not such an agent, any more than a carter, a warehouseman, or a packer.

Pledge by consignee for sale.]—In *Close* v. *Holmes* (*t*), which was tried before Baron Alderson in 1837, a factor, who was the consignee of goods for sale and indorsee of the bills of lading, had landed and warehoused the goods, and taken the wharfinger's certificate and dock warrants in his own name, and then pledged the certificates and warrants to a bank for an advance of money on his own account. The learned judge left it to the jury to say whether the banking company, at the time they made the advances, were aware that the goods did not belong to the pledgor, and whether the latter himself had any transferable lien under the 5th section of 6 Geo. 4, c. 94. The jury found for the plaintiff on both points. Another point had been raised during the trial—viz., that the documents having been created by the factor himself, for the purpose of raising money, were [★ 491] ★ not within the statute. His lordship was clearly of opinion that the statute only gave validity to pledges by a factor of documents intrusted to him by the real owner, and that it did not extend to the pledge of documents created, as in the present instance, by the factor himself.

Pledges—when not within 6 Geo. 4, c. 94.]—In *Janberry* v. *Britten* (*u*), 1838, it was held that a pledge by a person holding goods for another was not within 6 Geo. 4, c. 94, where it did not appear on the pleadings that the goods were intrusted to him as agent for sale. So it was held in a subsequent case (*x*), that a possession of documents by a person in his own right is not within the statute. Nor is it sufficient for the holder of a document of title to goods to show that he is an innocent indorsee. Such documents must also have been intrusted to the pledgor by the true owner, and must have been intrusted to him as agent (*y*).

Right to sell or pledge goods contained in document of title.]—Sec. 2 provides that any person intrusted with and in possession of any bill of lading, India Warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, is the true owner of the goods described in such document

(*t*) 2 Moo. & R. 22.
(*u*) 5 Scott, 655.
(*x*) Jenkyns *v.* Usborne, 7 Man. & G. 679 (1844).
(*y*) See per Baron Parke, Van Casteel *v.* Booker, 18 L. J., Ex. 14.

so as to make valid contracts for the sale or disposition of such goods, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument advanced or given by him upon the faith of such document, provided the person who advances the money or gives the security has no notice that the person so intrusted is not the true owner. By the use of the word disposition the legislature did not intend to give effect to any transaction which was neither a sale nor a pledge (*z*).

Pledge must be for money.]—A deposit or pledge to come within the section must have been made for money, or the negotiator must have advanced or given upon the faith of the documents pledged (*a*).

Notice of ownership.]—The notice may be express or implied. It is sufficient notice if the circumstances would justify a ★rea- [★492] sonable man in inferring that the agent is not the true owner (*b*).

Effect of 6 Geo. 4, c. 94, s. 2.]—The 2nd section of 6 Geo. 4, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bonâ fide* with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer* v. *Pearson* (*c*), by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons intrusted with" these documents of title, on which words a construction was put in the two cases of *Phillips* v. *Huth* (*d*) and *Hatfield* v. *Phillips* (*e*). The 5 & 6 Vict. c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The 2nd section of 6 Geo. 4, c. 94, also contained a proviso that the purchaser or pledgee had not notice by the documents or otherwise, that the seller or pledgor was not "the actual and *bonâ fide*" owner of the goods sold or pledged—a proviso which, after the decision of *Fletcher* v. *Heath* (*f*), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict. c. 39.

Effect of 6 Geo. 4, c. 94, s. 4—Antecedent debts.]—In the 4th section of 6 Geo. 4, c. 94, the language used by the legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the 2nd section, and authorize "any person intrusted with the possession of the goods," to sell them to anyone not having notice that this person is not the

(*z*) Taylor *v.* Trueman, 1 Mood. & M. 453; Taylor *v.* Kymer, 3 B. & Ad. 320.
(*a*) *Ibid.*
(*b*) Evans *v.* Trueman, 1 Mood. & R. 10.
(*c*) *Supra.*
(*d*) 6 M. & W. 572.
(*e*) 9 M. & W. 647; 12 Cl. & F. 343. Per Blackburn, J., Cole *v.* North Western Bank, *supra.*
(*f*) 7 B. & C. 517.

true owner; but it enacts that it shall be lawful to contract with "any agent" intrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and to pay for the same to "such agent;" and such sale and payment is to be good, not-[★ 493] withstanding the purchaser has ★ notice that the party selling or receiving payment is only an agent; provided such contract or payment is made in the usual course of business, a proviso which by itself alone shows that the legislature meant by the word "agent" only such agents as in the usual course of business sell goods for their principals and receive payments, such as factors, brokers, and did not mean to include bailees, warehousemen, carriers, and others who may in one sense no doubt be called agents, but who do not sell or receive payment for goods intrusted to them by those supplying them. It therefore solves the second doubt in *Dyer* v. *Pearson* (*g*) by declaring that if the evidence should be such as to show that the person in possession of the goods was intrusted as "an agent," a sale by him should bind the true owner (*h*). But no person is to acquire a security upon goods in the hands of an agent for an antecedent debt beyond the amount of the agent's interest in the goods (*i*). The 4th section makes it lawful for any person to contract with any agent "intrusted with any goods," and to receive such goods and pay for the same to such agent, and "such contract and payment shall be binding upon and against the owner" notwithstanding such person shall have notice that the person making the contract is only an agent, "provided such contract and payment be made in the usual and ordinary course of business, and that such person or persons . . . shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, ware or merchandise, or to receive the said purchase-money."

The intrusting must be quâ *agent.*]—In construing this section, the two branches must be looked at. We must first see whether the agent was of the species to which the act refers, and, secondly, whether the contract is made in the ordinary course of business by the party selling. As to what is meant by the term "agent," it was said by Mr. Justice Coltman in *Baines* v. *Swainson* (*k*), "I think the real meaning is this, that the person is to be intrusted *quâ* agent, and that the great difficulty is to see what is the real meaning of the word 'agent.' . . There must be the relation of principal and agent; perhaps it does not apply to every case of principal and agent, and [★ 494] I cannot think ★ that it applies whenever goods are given to a person ostensibly acting as factor. . . . We must look to see whether he is an agent instrusted with any goods, and the specific

(*g*) *Supra.*
(*h*) Per Blackburn, J., in Cole *v.* North Western Bank, *supra.*
(*i*) Sect. 3; and see Fletcher *v.* Heath, 7 B. & C. 517; Blandy *v.* Allan, 3 C. & P. 447.
(*k*) 32 L. J., Q. B. 281.

kind of agency intended. . . . I think the right view was taken by the Vice-Chancellor (*l*), when he says it must be a mercantile transaction." The section is not confined to the case of a factor who has authority to sell (*m*).

Advance with notice.]—Where a person makes an advance, or gives security, with notice, his lien does not extend beyond the agent's interest (sect. 5). This section does not apply unless it appears that the principal was indebted upon the whole account between himself and the agent (*n*).

Right to follow goods.]—But the true owner is entitled to follow his goods while in the hands of his agent or of the assignee in bankruptcy, or to recover them from a third person upon re-payment of advances (sect. 6).

Effect of no notice of agency.]—In order that a purchase may be protected under 6 Geo. 4, c. 94, s. 4, it is not necessary that money should actually pass. The section applies equally where the goods are transferred by the factor in consideration of an antecedent debt (*o*). The plaintiffs employed B. to sell blankets, and afterwards sent him a quantity on consignment and not on sale. B., being indebted to the defendant in a sum exceeding their value, sold them to him without disclosing the fact of his agency. The defendant had no notice of the agency. In an action brought to recover the value, the Common Pleas Division held, on the authority of *Carr* v. *Hinchliff* (*p*), *Ex parte Dixon* (*q*), and similar cases, that the defendant was entitled to set off his debt. Grove, J., cited Lord Mansfield's statement of the law in *Rabone* v. *Williams*, which was cited by Lord Kenyon in *George* v. *Claggett* (*r*), to the effect, that "where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person dealing with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against ★ the [★ 495] factor in answer to the demand of the principal." This principal runs through a great number of decisions (*s*).

Preamble of 5 & 6 Vict. c. 39.]—The 5 & 6 Vict. c. 39 commences with a preamble, and though the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the legislature, that preamble is of great importance. It first recites that, under 6 Geo. 4, c. 94, "In the present state of the law, advances cannot safely be made upon goods or

(*l*) Wood *v.* Rowcliffe, 6 Ha. 191.
(*m*) *Ibid.*
(*n*) Robertson *v.* Kensington, 5 M. & R. 381.
(*o*) Thackrah *v.* Fergusson, 25 W. R. 307.
(*p*) 4 B. & C. 547.
(*q*) L. R., 4 Ch. Div. 133.
(*r*) 7 T. R. 359.
(*s*) See Sect. 1 of this Chapter.

documents of title to persons known to have bought of agents only." This points to *Fletcher* v. *Heath* (*t*), and shows an intention to alter the law as there decided. It then recites that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as by the said recited act is given to sales; and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advance *bonâ fide* made on the security thereof."

Changes in the law—Power of sale to include right to pledge—Exchanges.]—This recital shows a plain intention to enact that what had ever since the case of *Paterson* v. *Tash* (*u*) been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not a power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. 4, c. 94, s. 4, was given; nor to alter the construction put upon that enactment by *Monk* v. *Whittenbury* (*v*). There is a further recital that the act does not extend to protect exchanges *bonâ fide* made. This refers to *Taylor* v. *Kymer* (*x*), and perhaps *Bonzi* v. *Stewart* (*y*), though that latter case, after a very [★ 496] protracted litigation, was not ★ decided till a few weeks before 5 & 6 Vict. c. 39, received the royal assent, and this recital shows an intention to alter the law as there decided. There is an express recital pointing to the decision in *Phillips* v. *Huth* (*z*), and the case of *Hatfield* v. *Phillips* (*z*), which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but from the enactment in the 4th section, it is plain that these causes were in contemplation, and that it was intended to alter the law as laid down in those cases (*a*).

Bonâ fide *pledges by agent.*]—Lord St. Leonards discussed the effect of 5 & 6 Vict. c. 39, at some length in *Navelshaw* v. *Brownrigg* (*b*). The conclusion to which his lordship came was, that whereas there was at first a question how far a broker could sell, if he had no authority to sell, and, secondly, how far he had author-

(*t*) 7 B. & C. 517.
(*u*) 2 Str. 1178.
(*v*) 2 B. & Ad. 484. Per Mr. Justice Blackburn in Cole *v.* North Western Bank, L. R., 10 C. P. 369, 370.
(*x*) 3 B. & Ad. 320.
(*y*) 4 M. & G. 295.
(*z*) *Supra.*
(*a*) Per Blackburn, J., in Cole *v.* North Western Bank, L. R., 10 C. P. 370.
(*b*) 2 D.. M. & G. 441.

ity to pledge if he had no authority to pledge, so as to bind his principal, the 5 & 6 Vict. c. 39, provided that the mode of raising money by pledge by a factor is to be taken as a recognized course of dealing, and that being so, the legislature intended to give protection to all persons dealing *bonâ fide* with such agent. With respect to the meaning of the expression "dealing *bonâ fide*," it has been said by Vice-Chancellor Page Wood (*c*), "dealing *bonâ fide* did not imply that they [the persons who dealt with the agent] were to consider the question of his being an agent or not; they might know him to be an agent or a factor, and if they knew him to be such, they would assume that he had authority to pledge, and that pledge they would have, unless there was some *malâ fides* in the transactions."

Powers of agent intrusted with goods or documents of title—Notice of agency.]—It is provided by the 1st section, that any agent intrusted—

(1.) With the possession of goods; or,

(2.) With the possession of the documents of title of goods,

is to be deemed the true owner of the goods or documents, so as to give validity to any contract or agreement by way of pledge, lien or security, *bonâ fide* made by any person with him, as well as for any original loan, advance or payment, made upon the security of such goods or documents, and also for any further or ★ con- [★ 497] tinuing advance in respect thereof. Such agreement is binding upon the owner and all others, notwithstanding that the person claiming such pledge or lien has had notice that the person with whom the agreement is made is only an agent.

The 2nd section provides, that contracts made in consideration of an advance include any contract or agreement for pledge, lien or security, made *bonâ fide* in consideration of the transfer to the agent of any other goods, documents of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien in respect of a previous advance by virtue of some contract or agreement made with such agent; provided the lien acquired under the last-mentioned agreement shall not exceed the value of the goods given up.

This section alters the law as laid down in *Taylor* v. *Kymer* (*d*).

The 3rd section provides, that this act is to be construed to give validity to such contracts and agreements only, and to protect only such loans, advances and exchanges, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements has no authority, or is acting *malâ fide*. It shall not be construed to protect any lien or pledge in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given; nor to authorize any agent in deviating from any express orders of the owner.

(*c*) Portalis *v* Tetley, L. R., 5 Eq. 146.
(*d*) 3 B. & Ad. 320.

Documents of title.]—The 4th section enumerates the documents which are to be considered documents of title. These are—

(1.) Bills of lading.

(2.) India warrants.

(3.) Dock warrants.

(4.) Warehouse-keeper's certificates, warrants or orders for the delivery of goods.

(5.) Any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented.

Act only applies to mercantile transactions.]—In a case decided in 1846 (*e*), Vice-Chancellor Wigram made some important [★ 498] ★ observations upon the application of the Factors' Acts (6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39). One Wright had been employed by the plaintiff to take possession of certain goods as his agent. Wright did so, and whilst in possession assigned them to the defendant as a security for a loan. It was contended that the transaction so far as concerned the defendant, was protected. "It may be true," said his honour, "that the words of the statute (5 & 6 Vict. c. 39), in their general signification, are wide enough to comprehend the present case. But the act has never been understood to apply to other than mercantile transactions. The first act (6 Geo. 4, c. 94) is for the 'protection of the property of merchants and others,' and the property referred to is 'goods, wares and merchandize' intrusted to the agent 'for the purpose of consignment or sale,' or 'shipped.' And, upon a judicial construction of the act, it has been held that the generality of the expressions must be restricted. Every servant of the owner of goods employed in the care or carriage of such goods is, in one sense, an 'agent intrusted with goods,' but still he is not an agent within the meaning of the statute (*f*). The title of the second act (5 & 6 Vict. c. 39) is more general; but it appeared to me to relate to 'agents,' and to 'goods and merchandize,' in a sense which is not applicable to the agency or the property in this case." So it has been said by Mr. Justice Willes (*g*), that the result of the cases may be stated to be that the term "agent" does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name. Neither a clerk (*h*) nor a vendee (*i*) is an agent within the act.

(*e*) Wood *v.* Roweliffe, 6 Ha. 191.
(*f*) Monk *v.* Whittenbury, 2 B. & Ad. 484.
(*g*) Heyman *v.* Flewker, 13 C. B., N. S. 519; 32 L. J., C. P. 132.
(*h*) Lamb *v.* Attenborough, 31 L. J., Q. B. 41.
(*i*) Jenkyns *v.* Usborne, 7 M. & Gr. 678; M'Ewan *v.* Smith, 2 H. L. C. 309.

The definition of he word "agent" given by Mr. Justice Willes in *Heyman* v *Flewker* (*k*), was accepted by the House of Lords in *City Bank* v. *Barrow* (*l*).

A tanner who has a lien on goods for his labour, does not, by undertaking to procure freight, or by sending the goods to their ★ owner become an agent within the meaning of the [★ 499] Factors' Acts (*m*).

Goods obtained by agent's fraud.]—If the true owner did in fact intrust the agent as an agent, it is immaterial, so far as third parties dealing with such agent are concerned, that he was induced to do so by the agent's fraud. In *Sheppard* v. *The Union Bank of London* (*n*), decided in 1862, it was so held on demurrer by the Court of Exchequer. Baron Channell pointed out that, if the circumstance of fraud in the agent made the slightest difference, the statute would in effect be repealed, since its object was to protect a person who made an advance knowing nothing of the dealings between the principal and agent. A similar question was determined by the Queen's Bench in the following year (*o*). A factor and commission agent induced the plaintiffs to forward a quantity of cloth to him upon the representation that certain merchants wished to buy cloth of that kind. He fraudulently sold the cloth to others, and applied to his own use the money he received in payment. The plaintiffs knew that he was a commission agent, but had no previous business with him. "I construe the statute to say this," observed Mr. Justice Blackburn, "that an agent whose business it is to sell goods and receive payment for them, shall by virtue of the act be entitled to sell, and, by virtue of the 5 & 6 Vict. c. 39, which extends the power, he shall be clothed with apparent authority to pledge the goods, provided he does it in the ordinary course of business, and the owner shall be exactly in the position of a man at common law who had clothed him with such authority, and any restrictions which he may have made shall go for nothing, unless they are brought home to the notice of the other person."

"*Intrusting*" *under Factors' Acts before Act of 1877.*]—"Intrusting" under the Factors' Acts, previous to the Act of 1877, must be "to a factor or agent as such." The defence on those acts in these cases turns on 6 Geo. 4, c. 94, s. 2, for 5 & 6 Vict. c. 39, s. 1, so far as these cases are concerned, only repeals the proviso in sect. 2 of 6 Geo. 4, c. 94, as to the pledgee not having notice (*p*). Before touching upon the alteration made ★ in the law [★ 500] by the Factors' Act, 1877, there remains to be noticed three cases of some importance, inasmuch as they throw light upon the inten-

(*k*) 13 C. B., N. S. 519.
(*l*) 5 App. Ca. 664.
(*m*) City Bank *v.* Barrow, 5 App. Ca. 664.
(*n*) 31 L. J., Ex. 154.
(*o*) Baines *v.* Swainson, 32 L. J., Q. B. 281.
(*p*) See per Bramwell, L.J., in Johnson *v.* Credit Lyonnais Company, L. R., 3 C. P. Div. 32.

tion of the legislature in passing that act. In *Cole* v. *The North-Western Bank* (*q*), A., who was a wool broker and warehouse keeper, was in the habit of receiving from the plaintiffs, in his capacity of warehouse keeper, bills of lading for wools. The wool sent by the plaintiffs to A. consisted of goats' wool and sheep's wool. A. never sold goats' wool, and the sheep's wool he sold only under specific instructions. The plaintiffs had sent a quantity of goats' and sheep's wool to be taken charge of in the above manner, but gave him no instructions to sell or pledge either. A. nevertheless pledged both with the defendants for a loan. An action was thereupon brought to try the right of the defendants to this wool. It was argued on behalf of the defendants that A. was an agent, that he was an agent intrusted with the possession of goods, and that he was also intrusted with the documents of title to the goods. Lord Coleridge, in the court below, conceded that all this was in a sense true, but that it was not sufficient to determine the point at issue, inasmuch as the question was whether A. was so intrusted within the meaning of the act of parliament (*r*). It was also contended that *Monk* v. *Whittenbury* (*s*) could no longer be considered good law, because that and similar cases were overruled by 5 & 6 Vict. c. 39. In 6 Geo. 4, c. 94, upon which *Monk* v. *Whittenbury* was decided, the words are "any person intrusted for the purpose of consignment or of sale with any goods," &c.; whereas in 5 & 6 Vict. c. 39, the words are "any agent intrusted with the possession of goods, or of the documents of title to goods." There are, however, numerous decisions to the effect that the words in the later act must be taken with some limitation (*t*). The Court of Queen's Bench had already held (*u*) that the question under 5 & 6 Vict. c. 39 was much the same as under 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94. The Common Pleas adopted the same view in the present case.

Upon appeal the decision of the court below was affirmed. "The argument," said Baron Bramwell, "is that he is an agent, and that he is intrusted with the possession of the goods. But [★ 501] ★ unless we adopt a verbal construction that leads to absurdities, some limitation must be put on those words,—some such limitation as 'agent intrusted as such, and ordinarily having, as such agent, a power of sale or pledge.' Otherwise, the words would include the case of an agent for the sale of one thing, say a metal broker intrusted with a thing unconnected with his agency,—say wool; and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor according to the usage of business appeared to give such power." The conclusion of sect. 1 protects certain transactions, notwithstanding notice

(*q*) L. R., 9 C. P. 470.
(*r*) 5 & 6 Vict. c. 39, s. 1.
(*s*) 2 B. & Ad. 484.
(*t*) See Baines *v.* Swainson, 4 B. & S. 270; 32 L. J., Q. B. 281; Wood *v.* Rowcliffe, 6 Ha. 183.
(*u*) Baines *v.* Swainson, *supra*.

of agency, but his lordship pointed out that "notice that the person is only an agent," must mean notice that the person is only an agent such as the pledgor might well suppose had power to pledge.

A delivery order intrusted to a factor and addressed to vendors for the delivery of specific quantities of goods which have been previously purchased, is within the Factors' Acts (*v*). So if a factor has sold his principal's goods, and the principal sends him the delivery order for the purpose of completing the sale by the delivery of the goods, this is an intrusting of the factor with the delivery order for the sale of the goods (*x*).

The facts in *Vickers* v. *Hertz* (*x*), which was decided in 1871, bear some resemblance to those in *Baines* v. *Swainson* (*y*). C., a Glasgow merchant, had represented to the plaintiff that he had made for the plaintiff a sale to a principal of a quantity of iron. This was quite untrue. The plaintiff was induced by the falsehood to send a delivery order to C., but he did not intrust him with the delivery order for the purpose of making a sale. He thought the sale was already made, and intrusted the agent with the document of title to make delivery of the goods as his agent. The House of Lords held that a pledge by C. to the defendant was good under the Factors' Acts. This decision is an authority in support of the proposition that the Factors' Acts are not confined to the case of a factor who is intrusted for the purpose of effecting a sale not yet made.

Johnson v. *The Credit Lyonnais* (*z*), decided in 1877, throws additional light upon the question what limitation should be placed upon the words "agent intrusted." From the facts of ★ the case it appeared that the plaintiff bought of A., a [★ 502] commission merchant and agent, as well as a dealer in tobacco, a quantity of tobacco which was then lying in bond in the name of A. The plaintiff paid for the tobacco, and it was agreed that it should be forwarded to him by A. free of any charge for commission, or to the plaintiff's vendees. The plaintiff undertook to remit the amount of the duty and dock charges. The tobacco remained in A.'s name, and he retained the dock warrants; but the sale to the plaintiff was duly entered in his books. Owing to the heavy duty payable on tobacco it is usual to leave the goods in the warehouse in the name of the seller. A. represented to the defendants that the tobacco in question belonged to him, and pledged it as a security for a loan. In an action to recover the property, the defendants claimed to retain it on the ground that the plaintiff had "given A. ostensible authority to deal with it as his own, or that he had intrusted him with the tobacco or the documents of title within the Factors' Acts." Upon motion for judgment, Mr. Justice

(*v*) Vickers *v.* Hertz, L. R., 2 Sc. Ap. 113.
(*x*) *Ibid.*
(*y*) 32 L. J., Q. B. 281.
(*z*) L. R., 2 C. P. Div. 224.

provides that where any document of title to goods has been lawfully endorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement, or by delivery, where the document is transferable by delivery or makes the goods deliverable to the bearer, to a person who takes the same *bonâ fide* and for valuable consideration, the [★ 505] last-mentioned transfer shall have the same ★ effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

The sixth section provides that the act shall not be retrospective.

The preamble of the Factors' Acts Amendment Act, 1877 (40 & 41 Vict. c. 39), above-mentioned, states the object to be the removal of certain doubts which have arisen with respect to the true meaning of certain provisions of the Factors' Acts, and to amend those acts, for the better security of persons buying or making advances on goods or documents of title to goods, in the usual and ordinary course of mercantile business.

The second section overrules Fuentes *v.* Montis.]—The second section accordingly provides that where any agent or person has been intrusted with and continues in possession of any goods or documents of title to goods, a revocation of his instrument or agency shall not affect the title or rights of any other person who without notice of such revocation, purchases such goods or makes advances upon the faith or security of such goods or documents.

This section overrules the well-known case of *Fuentes* v. *Montis*(*h*), in which the Court of Common Pleas and Court of Exchequer Chamber were of opinion that the words "intrusted with and in possession of" should be construed as referring to the time when the factor made the pledge, and held that a factor whose authority to sell has been revoked could not make a valid pledge of goods which had been intrusted to him for sale, but which he had wrongfully retained after his authority had been revoked, and the goods demanded from him by his principal. It is clear from the remarks of the judges who heard the case that they regretted the necessity of so deciding, and Mr. Justice Montague Smith remarked that he should have been glad to have given a construction of the Factors' Acts wide enough to include this case, as he thought it fell within the very mischief against which the legislature meant to provide. In its result the decision, as pointed out by Mr. Benjamin (*i*), had the effect of shaking the confidence felt by merchants in dealing with factors in relation to goods consigned to them.

[★ 506] ★ *The Act of 1877 applies to cases other than mercantile transactions.*]—The Factors' Acts which had been passed previously

(*h*) L. R., 2 C. P. 268; 4 *ib.* 93.
(*i*) Sales of Personal Property, p. 17.

to the Act of 1877 were intended to protect vendees or pawnees in their dealings with persons whose employment was of a commercial character; but they were not meant to protect transactions with persons whose employment was other than mercantile, as for instance, with persons employed as warehousemen, carriers, or the like. This protection has been extended by the 40 & 41 Vict. c. 39, to cases other than those in which the employment was of a commercial character.

Second vendor of goods.]—It is a general principal of the common law that the second vendor of goods does not stand in a better position than does his immediate vendor (*j*). The Factors' Act, 1877, has extended the exceptions to this rule. Sect. 3 protects sales or pledges to third parties by vendors of goods or their agents, being in possession of the documents of title, by providing, that "where any goods have been sold, and the vendor, or any person on his behalf, continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal acts as amended by this act, so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge or other disposition is made has not notice that the goods have been previously sold." Previous to the passing of the Factors' Act, 1877, a vendee was held not to be an agent within the meaning of the Factors' Act (*k*). The 4th section of the Act of 1877 now provides that "where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge or disposition of such goods or documents by such vendee so in possession, or by any other person or agent intrusted by the vendee with the documents within the meaning of the principal acts as amended by this act, shall be as valid and effectual as if such vendee or other person were an agent or ★ person in- [★ 507] trusted by the vendor with the documents within the meaning of the principal acts as amended by this act, provided the person to whom the sale, pledge or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods."

By sect. 1 the expression "principal acts" means the following acts:—4 Geo. 4 (1823), c. 83; 6 Geo. 4 (1825), c. 94; 5 & 6 Vict. (1842) c. 39.

The above acts together with the 40 & 41 Vict. c. 39, are to be cited as the "Factors' Acts, 1823 to 1877."

(*j*) Small *v.* Moate, 9 Bing. 574.

(*k*) Jenkyns *v.* Usborne, 7 M. & Gr. 678; M'Ewan *v.* Smith, 2 H. of L. Cas. 309.

Vendee in possession of goods—Defeasible title]—The case of a vendee who was in possession of a chattel had already been provided for (*l*). Where a vendee has a defeasible title which the vendor may affirm or disaffirm, he must elect to disaffirm before the goods are transferred to an innocent purchaser (*m*).

Principal of Lickbarrow *v.* Mason *extended.*]—Sect. 5 extends the principle of *Lickbarrow* v. *Mason* (*n*) to all documents of title to goods by enacting that where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide*, and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Delivery order—Effect of giving.]—The courts have frequently held that the giving of a delivery order did not operate as a constructive delivery of the goods to which it relates, and that it neither was equivalent to a bill of lading, nor deprived the owner of the goods who gave the order of his lien even against the claim of third persons who had *bonâ fide* purchased the goods from the original vendor. To this effect were the ruling of Mr. Justice Burrough in *Ackerman* v. *Humphrey* (*o*), and the decisions of the Court of Common Pleas (*p*).

[★ 508] ★ *Bankruptcy of agent—Rights of pledgee.*]—Where an agent, who subsequently becomes bankrupt, has given as security for an antecedent debt goods which belong to his principal, but which were held by the agent on such terms that they were in his order and disposition at the time of the bankruptcy, the pledgee cannot assert a lien against the trustee in bankruptcy (*q*). A customer purchased of a horsedealer a pair of horses with a warranty. The purchase-money was paid, but the horses not being as warranted were returned, and the horsedealer promised to supply another pair. Subsequently he sent the customer another pair, which, upon her refusing to buy them, he requested her to use until a suitable pair was found. The horsedealer afterwards became bankrupt, when it was found that the horses belonged to another person who had intrusted them to the dealer on such general terms that the county court judge had held that they were in the bankrupt's order

(*l*) Kingsford *v.* Merry, 11 Ex. 577.
(*m*) White *v.* Garden, 10 C. B. 919.
(*n*) 1 Sm. L. C. 757, 7th edit.; and see The Adelphi Bank *v.* Halifax, &c. Co., Times L. R., Nov. 2 1887, p. 21.
(*o*) 1 Car. & P. 53.
(*p*) Jenkyns *v.* Usborne, 7 M. & Gr. 678; M'Ewan *v.* Smith, 2 H. of L. Cas. 309.
(*q*) *In re* Silence, *Ex parte* Roy, 47 L. J., Bank. 36.

and disposition at the time of the bankruptcy, with the consent of the true owner. The customer claimed a lien upon the horses against the trustee in bankruptcy, on the ground that the trustee could only take them subject to the same equities as those to which the bankrupt held them before his bankruptcy, which included the lien. On the other hand, it was urged that the bankrupt being simply a factor could, not pledge for an antecedent debt. The chief judge held that the bankrupt could not create such a lien, pointing out that the bankrupt could only deal with the horses under the order of his principal (*r*).

Summary.]—In the following paragraphs an attempt is made to reduce to as brief limits as possible those rules of common law, and those provisions of the Factors' Acts, 1823 to 1877, which prescribes the conditions which must be fulfilled upon the making of unauthorized sales, pledges or exchanges, so as to protect the third parties contracting.

First, as to the person who sells, pledges or exchanges.

There must be proof that the transaction was entered into under circumstances from which it might reasonably be inferred that the owner had given him authority to enter into the transaction (*s*), or there must be proof that he was intrusted with the possession of the goods, or of the documents of title to the ★ goods (*t*); or [★ 509] that upon a sale of goods subsequently sold and pledged, or otherwise disposed of by him, he was the vendor, or a person who acted on behalf of the vendor, and that he continued or was in possession of the documents of title to such goods (*u*); or that upon a contract for the sale of goods subsequently sold, pledged, or otherwise disposed of by him, he was the vendee, or a person acting on behalf of the vendee, and had obtained possession of the documents of title to the goods from the vendee or his agent (*v*).

Where an agent is possessed of a document of title, it is immaterial whether he derived it immediately from the owner of the goods, or obtained it by reason of his possession of the goods, or of any document of title to the goods (*x*).

An agent is to be deemed to be in possession of goods or documents of title, whether they are in his actual custody, or held by another person subject to his control, or for him, or on his behalf (*y*).

A contract or agreement is within 5 & 6 Vict. c. 39, whether made with the agent or with another person on his behalf (*z*).

An agent in possession of goods or documents of title is to be

(*r*) *Ibid.*
(*s*) Pickering *v.* Busk, 15 East, 38; Cole *v.* North Western Bank, L. R., 10 C. P. 572.
(*t*) 5 & 6 Vict. c. 39, s. 1.
(*u*) 40 & 41 Vict. c. 39, s. 3.
(*v*) *Ib.*, s. 4.
(*x*) 5 & 6 Vict. c. 39, s. 4.
(*y*) *Ibid.*
(*z*) *Ibid.*

deemed to be intrusted therewith by the owner, unless the contrary is shown in evidence (*a*).

Secondly, as to the person who buys the goods, or makes an advance or exchange.

Unless he acted *bonâ fide* on the faith of the apparent authority of the person in possession, he cannot claim the goods or documents as against the owner; but notice simply of the fact of agency does not affect his claim (*b*).

The 5 & 6 Vict. c. 39 is to be construed to give validity only to transactions made *bonâ fide*, and without notice that the agent is acting *malâ fide* against the owner of the goods (*c*).

Thirdly, as to the sale, pledge, or exchange which is protected.

The purchase, pledge, or exchange must be *bonâ fide*, and without notice that the agent is acting *malâ fide* against the owner of the goods (*d*).

The contracts made in consideration of an advance which are [★ 510] ★ protected are contracts or agreements by way of pledge, lien or security *bonâ fide* made for any original loan, advance or payment made upon the security of the goods or documents, as well as for any further or continuing advance, but not for any antecedent debt due from the agent (*e*).

Contracts in consideration of an advance include any contract or agreement for pledge, lien or security made *bonâ fide* in consideration of the transfer to the agent of any other goods, documents of title or negotiable security upon which the person so delivering up the same had at the time a valid and available lien in respect of a previous advance by virtue of some contract or agreement made with such agent, provided the lien acquired under the last mentioned contract or agreement shall not exceed the value of the goods given up (*f*).

A revocation of an instrument or agency does not affect the title of a person who enters into a contract with the agent or person intrusted without notice of such revocation (*g*).[1]

The lawful transfer of any document of title to goods by a vendee has the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu* (*h*).

SECT. 4.—*The Right to rescind Contracts affected by Fraud.*

Collusion between principal and agent of the other principal.]—Any surreptitious dealing between one principal and the agent of

(*a*) *Ibid.* (*b*) *Ibid.* s. 1. (*c*) *Ib.* s. 3. (*d*) *Ibid.*
(*e*) 5 & 6 Vict. c. 39, s. 2. (*f*) *Ibid.*
(*g*) 40 & 41 Vict. c. 39, s. 1. (*h*) *Ib.*, s. 5.

[1] Hatch *v.* Coddington, 95 U. S. 48; Murphy *v.* Ottenheimer, 84 Ill. 39; Packer *v.* Huickley Locomotive Works, 122 Mass. 484.

another principal is a fraud upon the latter of which courts of equity will take cognizance. The consequence of such fraud is that the party defrauded will be entitled to such full redress as can be given.[1] In one case Lord Justice James expressed an opinion that the defrauded principal would be entitled at his option, if he came in time, to have the contract rescinded; or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him (*i*). Lord Justice Mellish, in the absence of authority, was not quite certain that he would go the full length of saying that, because ★a person has been a party to a [★511] fraudulent act after the contract has been made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other party to say, 'Because you acted fraudulently, therefore I will have nothing more to do with you." There is no doubt of the principle of law, that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, at his option, rescind the contract (*k*). If the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different, that is sufficient to justify a rescission (*l*).

Sub-contract by engineer—Surreptitious dealing.]—The above question was elaborately argued in 1874 before Vice-Chancellor Malins, and afterwards, on appeal, in *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha and Telegraph Works Company* (*m*). The defendants agreed with the plaintiffs to lay a cable, which was to be paid for by a sum of 40,000*l.*, payable when the cable was begun and by twelve instalments of 15,000*l.*, each payable on certificates by the plaintiffs' engineer, who was named in the contract. The engineer, being subsequently engaged to lay other cables for the defendants, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the defendants when they received them from the plaintiffs. Upon an order to begin making the cables, the plaintiffs gave cheques for 40,000*l.* to the defendants, and for 600*l.* to the engineer. The sub-contract between the defendants and the engineer was not disclosed to the plaintiffs. Subsequently, after its existence was discovered, the present bill was filed for the purpose of having the original contract delivered up to be cancelled, and of obtaining a decree for the repayment of the above sums. The decree of the

(*i*) Panama, &c., Company *v.* India Rubber, &c., Company, L. R., 10 Ch. 515.
(*k*) Per Lord Justice Mellish, *ib.*
(*l*) Planché *v.* Colburn, 8 Bing. 14.
(*m*) L. R., 10 Ch. 515.

[1] The rule which charges a principal with the knowledge of his agent is for the protection of innocent third persons. If a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent. National Life Ins. Co. *v.* Minch, 53 N. Y. 144; Mackintosh *v.* Eliot Bank, 123 Mass. 393; Southern Ex. Co. *v.* Palmer, 48 Ga. 85.

vice-chancellor granting the prayer was affirmed by the Court of Appeal. Lord Justice James proceeded upon the ground that any surreptitious dealing between one principal to a contract and the agent of the other principal entitles the latter principal to have the contract rescinded. Lord Justice Mellish went rather upon the [★ 512] ground that the sub-contract, by depriving ★the plaintiffs of the services of their engineer, made such a material and essential difference in the performance of the contract as entitled the plaintiffs to say that the contract should be rescinded.

Contracts induced by fraud of principal.]—It is clearly fraudulent for the owners of property to arm a person whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves as owners to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer as if it were the real one. If that is not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent, who is to induce others to accept the offer, is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is false and dishonest, representing a false transaction in order to deceive; and if a person purchasing in ignorance of the circumstances applies, the contract will be rescinded, and the price ordered to be paid (*n*).

The doctrine of laches.]—The defence of laches was set up in the above case, and it may not be amiss to quote the observations of the court upon that doctrine. The doctrine of laches in a court of equity, it was said, is not an arbitrary or a techical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though not perhaps waiving that remedy, yet put the other party in a situation in which it is not reasonable to place him if the remedy were afterwards to be asserted—in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that reference must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay, and the nature of the acts done during the interval which might affect either [★ 513] party, and cause a balance of justice or injustice ★in taking the one course or the other, so far as relates to the remedy.

The right to obtain damages was discussed in a case which was decided in the Court of Appeal in the year 1877 (*o*). The action was brought to recover damages sustained as alleged by

(*n*) Lindsay Petroleum Company *v.* Hurd, L. R., 5 P. C. 221.
(*o*) Schroeder *v.* Mendl, 37 L. T. 452.

reason of the defendants' having made a false representation to the plaintiffs with respect to a cargo of rye bought by the latter of the former. The pleadings were drawn under the old practice. The following facts were proved at the trial: The defendants, who were corn merchants in London, received a telegram from their agent in Gibraltar, stating "'Golden Plover' arrived this afternoon. Cargo good condition. Await your orders." They thereupon advertised the cargo for sale, and on the plaintiffs' agent negotiating with them showed him the telegram. They did not know whether the cargo had been examined by their agents at Gibraltar, but they knew it was not usual to examine cargoes at a British port of call unless an order was sent to the agent from the owners. No such order had been sent. The plaintiffs' agent, on inquiring whether the defendants were sure the cargo was in good condition, was shown the telegram. The purchase was then made for the plaintiffs. The memorandum stated that the cargo was "of fair average quality of the season's shipment when shipped." On arrival, it turned out to be quite rotten, and was sold by the plaintiffs at a loss. Mr. Justice Field ruled that there was no case for the jury, as there was no evidence that the representation was false to the knowledge of the person making it, but postponed judgment to enable the plaintiffs to move for a new trial. A rule was accordingly granted by the Common Pleas Division. This decision was reversed by the Court of Appeal, consisting of Lords Justices Bramwell, Brett, and Cotton. The plaintiffs' counsel relied upon the grounds—first, that in equity, on showing a contract made through a misrepresentation, although innocent, the plaintiffs might rescind it, and each party be put in the same position that they were before the contract was entered into. "This contention," said Lord Justice Bramwell, "was not open to them, because it did not arise on the declaration or at the trial." Secondly, that because ★ the defendants' agent made a false representa- [★ 514] tion to the defendants they adopted it, and are liable for his representation. This point, also, was not open on the pleadings. There was another contention that, by giving the telegram to the plaintiffs' agent, the defendants represented that the cargo had been inspected. This inference was held to be unreasonable.

With respect to the claim to equitable relief, Lord Justice Cotton remarked:—"It is clear from the pleadings that it is an action for damages, and not for setting aside a contract, or obtaining relief on that footing. It is not an attempt to repudiate a contract made but not acted on, for here the corn is sold." And with respect to the contention that if the case was not sufficiently proved to maintain an action for damages, on the ground of the *scienter* being absent, equity will, nevertheless, grant relief when an innocent misstatement has been made which causes loss or injury; and that it is with respect to the setting aside of a contract induced by misrepresentation when in a court of law no action can be maintained

for deceit, went on to say:—"But would the same kind of misrepresentation support an action for damages in equity? Suits for damages are of rare occurrence in equity, although it has a jurisdiction in cases of fraud, and will give relief where a court of common law has not that power (*p*). A court of common law can only give relief where *scienter* is proved, but it is otherwise with equity. But equity cannot give relief for damages arising from deceit, unless the same action were good at common law." The case of *The Reese River Silver Mine Company* v. *Smith* (*q*) was distinguished on the ground that the application there was to set aside a contract.

SECT. 5.—*The right of the principal to a performance of the agent's contract.*

Agent induced to break contract of service.]—An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which [★ 515] ★ thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed (*r*).

Where a tradesman's business is injured by reasons of imputations cast upon his assistant in relation to such business, an action is maintainable (*s*).

(*p*) Evans *v.* Bicknell, 6 Ves. 174; Pasley *v.* Freeman, 3 T. R. 51; Slim *v.* Croucher, 1 D., F. & J. 518.

(*q*) L. R., 4 E. & I. App. 64.

(*r*) Bowen *v.* Hall, 6 Q. B. D. 333; following Lumley *v.* Gye, 2 E. & B. 216.

(*s*) Riding *v.* Smith, 1 Ex. Div. 91; 45 L. J.. Ex. 281; following Evans *v.* Harries, 1 H. & C., 153; and distinguishing Ward *v.* Weeks, 7 Bing. 211.

★ CHAPTER VIII. [★ 516]

LIABILITY OF PRINCIPAL TO THIRD PERSONS.

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SECT. 1.—*On Contracts of Agent.*

Grounds of principal's liability.]—A principal is liable to third parties for whatever the agent does or says, whatever contracts, representations or admissions he makes, whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority, and

[★ 517] ★ provided a liability would attach to the principal if he was in the place of the agent (*a*).[1] But the agent alone is liable in the following cases:—

Where he covenants personally in instruments under seal;[2]

Where he contracts personally in negotiable instruments;[3]

(*a*) See Holmes *v.* Mather, L. R., 10 Ex. 261.

[1] It is a general rule that where the acts of the agent will bind his principal, representations, declarations and admissions, respecting the subject matter, will also bind him, if made at the same time and constituting a part of the *res gestae*. Linblom *v.* Ramsey, 75 Ill. 246; Prickett *v.* Madison Co., 14 Ill. App. 454. See Grimshaw *v.* Paul, 76 Ill. 166; Gifford *v.* Landrine, 37 N. J. Eq. 127; Lane *v.* Boston &c. R. R., 112 Mass. 455; Dickman *v.* Williams, 50 Miss. 500. The fact that the representations are false will not relieve the principal. Lamm *v.* Port Deposit & Association, 49 Md. 233; Planters' Ins. Co. *v.* Sorrels, 57 Tenn. 352. Nor that they are fraudulent. Lindmeier *v.* Monahan, 64 Iowa, 24. Principle is liable for a promise made by an agent within the scope of his authority. Tanner *v.* The Oil Creek R. R. Co., 53 Pa. St. 411, and by an agreement. Adams Ex. Co. *v.* Schlessinger, 75 Pa. St. 246. He is liable for the fraudulent conduct of his agent. May *v.* Gates, 137 Mass. 389, and for agent's negligence. Powers *v.* Harlow, 53 Mich. 507; Davis *v.* Danforth, 65 Iowa, 601, and for acts necessary to be done by agent to accomplish the object of his employment. Borcherling *v.* Katz, 37 N. J. Eq. 150, and for acts within the scope of his authority yet beyond his instructions. Lake Shore &c. R. R. *v.* Foster, 104 Ind. 293; Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Louisville &c. R. R. *v.* McVay, 98 Ind. 391.

The rule that a principal is liable for the acts of his agent, within the apparent scope of his authority, only applies where a third person has acted, believing and having a right to believe that the agent was acting within his authority, and where such person would sustain loss if the act of the agent was not considered that of the principal. Bickford *v.* Menier, 107 N. Y. 490.

If A. has so acted as to induce third persons to believe that B. is his agent, he is liable for all acts of B. in the same manner as if B. were actually his agent. In case any loss or liability results therefrom A. is stopped from denying the existence of the agency. Rice *v.* Goffman, 56 Mo. 434; Chouteau *v.* Goddin, 39 Mo. 229. See also on the liability of principal for acts of agent. Thomas *v.* Cummiskey, 108 Pa. St. 354; Eskridge *v.* Farrar, 34 La. An. 709. Forrester *v.* Georgia, 63 Ga. 349; Bronson *v.* Coffin, 118 Mass. 156; Caswell *v.* Cross, 120 *id.* 545. Tozier *v.* Crafts, 123 *id.* 480; Putnam *v.* Howe Ins. Co., 123 *id.* 324; Knox *v.* Barrett, 18 Fla. 594; Mass. Life Ins. Co. *v.* Eshelman, 30 Ohio St. 647; Ala. Gr. So. R. R. *v.* Hill, 76 Ala. 303; Kutzenstein *v.* R. R. Co., 84 N. C. 688; Chicago &c. R. R. *v.* Conklin, 32 Kan. 55; Plummer *v.* Buck, 16 Neb. 322; Bass *v.* C. & N. W. R. R., 42 Wis. 654. See Silliman *v.* Fredericksburg & C. R. R., 27 Gratt. (Va.) 119; Kline *v.* Cent. Pac. R. R., 37 Cal. 400, S. C. 99 Amer. Dec. 282. See Stephenson *v.* Grim, 100 Pa. St. 70; Brooke *v.* N. Y. &c. R. R., 108. Pa. St. 529. Hughes *v.* Bank, 110 *id.* 428; Cake *v.* Pottsville Bank, 116 *id.* 264.

Where the agent of one railroad company issues a ticket entitling the holder thereof to pass over successive roads, so far as the passenger is concerned, the road selling the ticket is to be considered the agent of the other companies. The latter are bound by the statements and agreement expressed on the ticket and made by the agent selling it, as to its limit and its stop-over privileges. Young *v.* Pennsylvania R. Co., 115 Pa. St. 112.

Where one desires to avail himself of the acts of an alleged sub-agent as against the principal, he must prove both the appointment of such sub-agent by an agent, and the authority of the agent to appoint the sub-agent. American Underwriters' Assoc. *v.* George. 97 Pa. St. 238.

[2] Quigley *v.* De Haas, 82 Pa. St. 267.

[3] Sturdivant *v.* Hull, 59 Me. 172; Powers *v.* Briggs, 79 Ill. 493.

Where exclusive credit is given to the agent, the principal being known;[1]

Where the agent commits a wilful wrong.

The liability of a principal to third persons upon contracts into which the latter have entered with the agent depends upon a number of considerations. Amongst those considerations are such as relate to the agent's authority and the conduct of the principal, secret limitations of authority, and the knowledge of the third persons, the ambiguity of the agent's instructions, the existence of a custom or usage, and the like. In considering the various questions which may thus arise, an advantage in respect of clearness may be gained by treating them according as they relate to cases—

1. Where the agent executes his authority strictly;
2. Where the agent exceeds his authority;
3. Where the principal ratifies an unauthorized contract;
4. Where the agent contracts in his own name;
5. Where the third party and the agent are identical.

First, then, as to the liability of the principal, where the agent has executed his authority strictly.—The rule is, that an agent who contracts as such, being authorized so to contract by a known principal, will incur no personal responsibility, unless the other circumstances of the case lead to the conclusion that he has either expressly or impliedly incurred or intended to incur such personal responsibility (*b*). The liability of the principal, in cases where the agent is duly authorized, will depend—first, upon the form of the contract; secondly, upon the answer to the question, To whom was credit given?

The effect of the form in which the contract has been executed was considered in Book II., Part II., Chaps. 2 and 3; and it will be sufficient to state briefly here the rules which are examined at length in those chapters. Thus—[2]

As to Deeds.—An agent may so execute a deed that it will ★ bind the principal and not himself, or that it will bind [★ 518] himself and not the principal, or that it will be void. A deed will bind the principal if executed in his name and on his behalf, and this fact appears on the face of the instrument.

As to Bills of Exchange.—If a bill is addressed to a principal, and accepted by his agent on behalf of that principal, the latter will be liable as acceptor; nor is it necessary that the agent should state on the face of the instrument any words to the effect that he accepts on behalf of the drawee.

As to Promissory Notes.—Where an agent promises and signs in the character of agent, the principal will be liable. The same

(*b*) Story on Agency, § 261; Paley, by Lloyd, 368, 369.

[1] Stackpole *v.* Arnold, 11 Mass. 37.

[2] See ante page 206 *et seq.*

rule applies where the words importing agency are confined to the signature.

Where the principal is not disclosed.]—The answer to the question, To whom was credit given? is of importance chiefly where the agent is acting for an undisclosed principal; and the inquiry whether a principal is disclosed or undisclosed is of importance only in questions of contract. The extent of the liability of an undisclosed principal to third parties has been defined by a series of decisions, extending from the case of *Raillon* v. *Hodgson* (*c*) to that of *Armstrong* v. *Stokes* (*d*). These decisions may be distributed under two heads; thus:—

(1.) The agent may give no information to the third party of the existence of a principal; or may simply inform the other contracting party of the fact of his agency without disclosing the principal's name;[1] or the third party, knowing that he is dealing with an an agent, and aware of the principal's name, may elect to deal with the agent alone;[2] or

(2.) The principal may be a foreigner resident abroad.[3]

In all these cases the question is, To whom was credit given? This is a question of fact for the jury, subject to the ruling of the presiding judge. An agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other. But the right to sue and the liability to be sued upon a contract are reciprocal, and these reciprocal rights and liabilities, as regards both principal and agent, continue until the other contracting party has elected to give exclusive credit to one [★ 519] or the other. ★If one of the parties to a contract which is not under seal (*e*), nor by bill of exchange (*f*), or promissory note (*g*), has a real principal behind him, that principal may sue upon the contract subject to any right of set-off there may be against the agent (*h*).

"There is no question that a contract in writing by an agent signed by himself will bind his principal when the other contracting party discovers the principal, although the contract was made

(*c*) 4 Taunt. 576 n.
(*d*) L. R., 7 Q. B. 598.
(*e*) Lord Southampton *v.* Brown, 6 B. & C. 718.
(*f*) Guidon *v.* Robson, 2 Camp. 302.
(*g*) Beckham *v.* Drake, 9 M. & W. 26.
(*h*) Kell *v.* Nainby, 10 B. & C. 20; and see per Blackburn, J., Spurr *v.* Cass, L. R. 5 Q. B. 656.

[1] Even where a written contract is entered into by an agent in his own name, it is competent to be shown by parol evidence that the agent was acting for an undisclosed principal; Barker *v.* Garvey, 83 Ill. 184. A contract made by a factor in his own name and without disclosing his principal, may be sued upon by the principal. In such an action the third party may set off an individual debt due by the factor to him; Parker *v.* Donaldson, 2 W. & S. (Pa.) 9.

[2] Clealand *v.* Walker, 11 Ala. 1059.

[3] Rogers *v.* March, 33 Me. 106.

without his knowing who is the principal. . . . . The law makes no distinction in contracts, except between contracts which are and contracts which are not under seal. I recollect one of the most learned judges who ever sat upon this or any other bench being very angry when a distinction was attempted to be taken between parol and written contracts, and saying 'they are all parol unless under seal.' If they are written they may indeed require to be stamped, but it is the Act of Parliament which makes that distinction, the Common Law makes none. A contract under seal can bind none but those who sign and seal it. A contract not under seal is open to all the Common Law requirements and incidents of a contract whether in writing or not" (*i*). "The doctrine," said Parke, B., "rests upon this principle, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal; and I am not aware of the existence of any cases in which a distinction has been suggested between a contract which has been entered into by one individual for another, or by two individuals for themselves and another as to the liability of the principal to be sued." If two partners enter into an agreement, the liability of a third as a principal will be shown on proof of his being a partner in the trade and sharing in its profits.

Qualification of his liability—Alteration of accounts to prejudice of principal.]—As to the cases under the first head, it is stated by Lord Tenterden, C. J., in *Thomson* v. *Davenport* (*j*), "I take it to be a general rule that if a person sells goods (supposing at ★ the time of the contract he is dealing with a princi- [★ 520] pal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may, in the meantime, have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the accounts between the principal and the agent is not altered to the prejudice of the principal." The qualification here mentioned remained a mere *dictum* until the decision of the Queen's Bench in *Armstrong* v. *Stokes* (*k*). Before touching upon the latter case, it will be convenient to refer briefly to the various *dicta* indicating an opinion on the part of the judges that such a qualification of the general rule would be recognized.

In *Railton* v. *Hodgson* and *Peele* v. *Hodgson* (*l*), which came before Mansfield, C. J., in 1804, that learned judge remarked: "If Hodgson had really paid S. L. and Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable,

(*i*) Per Lord Abinger, C. B., in Beckham *v.* Drake, 7 M. & W. 91 (1841). Affirmed, 11 M. & W. 315.
(*j*) 9 B. & C. 78.
(*k*) *Ubi supra.*
(*l*) Reported in a note to Addison *v.* Gandasequi, 4 Taunt. 576.

he would not have been so." The facts of these cases will be referred to when the subject of election by the vendor is examined. Mr. Justice Bayley, in *Thomson* v. *Davenport* (*l*), states the qualification in the following terms: "The principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller would call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." On the other hand, the expressions of Baron Parke, in *Heald* v. *Kenworthy* (*m*), seem to lead to the conclusion that that learned judge thought no such qualification existed. The decision itself cannot be accepted as an authority with reference to the existence or non-existence of the above qualification, inasmuch as the plea neither stated that the plaintiff was ignorant of the existence of the defendant till after the latter [★ 521] had paid the agent, nor affirms that the ★ defendant believed such to be the case. This was the opinion of the Queen's Bench in a subsequent case (*n*).

Statement of the law by Lord Ellenborough and the Queen's Bench.] —Lord Ellenborough decided two cases in 1807, which have been referred to upon this question. In the one (*o*), it was held, that where goods are bought by a broker who does not disclose his principal until he, the broker has become bankrupt, the principal cannot set off the price of the goods against a debt due to him from the broker. In the other (*p*), the plaintiff sold by public auction to brokers a quantity of coffee, to be paid for on delivery. The brokers acted for the defendant, whose name was not disclosed until the brokers became insolvent. The defendant having paid his brokers, refused to pay the plaintiff. Lord Ellenborough directed the jury that "a person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two than I should be were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged. But here payment was demanded of the defendant on the several days it became due." Light is thrown upon both these decisions by a considera-

(*l*) *Supra.*
(*m*) 10 Ex. 739, 745; 24 L. J., Ex. 76, 77.
(*n*) Armstrong *v.* Stokes, L. R., 7 Q. B. 598.
(*o*) Waring *v.* Favenck, 1 Camp. 85.
(*p*) Kymer *v.* Suwercropp, *ib.* 109.

tion of the fact that, in 1807, a London broker was bound by his bond to disclose his principal if required to do so, and to abstain from dealing on his own account (*q*). The question whether such a qualification existed was fully discussed in 1872, in the case of *Armstrong* v. *Stokes* (*r*), and the Court of Queen's Bench, consisting of Blackburn, Mellor, and Lush, JJ., decided that a vendor who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the principal has in good faith paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal. ★In [★ 522] this case, R. and Co., commission merchants, who sometimes dealt as agents and sometimes as principals, bought a quantity of shirtings of the plaintiff, who had never been informed that they dealt as agents, but in the event of any dealing had always settled with them. The contract to sell was made on the 15th June; payment was to be made on the 25th August. On the 24th August, R. and Co. asked for further time to pay. While the plaintiff was considering this proposition, R. and Co. stopped payment on the 30th August, on which day the plaintiff discovered that R. and Co. had been acting for the defendants. It was given in evidence that the defendants had paid R. and Co. for the shirtings on the 11th August, in the ordinary course of their business, and no imputation of *mala fides* was cast on the transaction. The Court held, that assuming that there was authority to establish privity of contract between the defendants and those from whom R. and Co. had obtained the goods, the defendants were not liable for the grounds above stated. The Court was apparently inclined to question the soundness in principle, but not the correctness in point of law, of the rule which allows a vendor to have recourse at all against one to whom he never gave credit.

Liability of undisclosed principal who has settled accounts with his agent.]—The cases dealing with the right of a creditor to sue an undisclosed principal who has settled accounts with his agent were, in 1882, again discussed by the Court of Appeal in *Davison* v. *Donaldson* (*s*), which is an authority for the proposition that partners have no implied right to settle with their co-partners without satisfying themselves that the payments have been actually made.

Jessel, M. R., dealt in his judgment with the principles in this class of cases. "There is a well-known principle of equity which has been long acted on, that if the defendant has been misled by the plaintiff, either by his words or by his conduct, to believe that which is not true, so that his position is altered, the plaintiff cannot be heard to deny the truth of what he has thus led the defendant to believe. This is well laid down in *Irvine* v. *Watson* (*t*). In that

(*q*) See the form of the bond in Holt, N. P. 431.
(*r*) L. R., 7 Q. B. 598.
(*s*) 9 Q. B. Div. 623.
(*t*) 5 Q. B. D. 414.

case the defendant had paid the broker, and the question was whether that discharged their liability to the plaintiffs. Bramwell, [★ 523] L. J., says, 'I think it is impossible ★ to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs and made such payment in consequence of such belief.' Now assuming that there is no distinction in this respect between a partnership and a case of principal and agent, that observation applies exactly to this case. The payment which the defendant made was not made in consequence of being misled by the plaintiffs. The mere fact that by the conduct of the plaintiffs he lost the opportunity of getting the money back is not sufficient." Bowen, L. J., in the same case, pointed out that the law was clearly laid down in *Heald* v. *Kenworthy* (*u*), and was sanctioned by the Court of Appeal in *Irvine* v. *Watson* (*x*).

From what has gone before it will be apparent that where an agent makes a purchase on behalf of his principal, and the agent informs the seller that the purchase is made on behalf of a principal, but does not disclose, and is not asked to disclose, his name, questions may arise as to the circumstances under which a payment by the principal to the agent will free the principal from liability to the seller.[1] *Irvine* v. *Watson* (*x*), which was decided in 1880 on further consideration by Bowen, J., and affirmed by the Court of Appeal, is an authority upon this question. The essence of such a

(*u*) 10 Ex. 739.
(*x*) 5 Q. B. Div. 102, 414; 49 L. J., Q. B. 239, 531; 42 L. T. 51, 800.

[1] In Johnson *v.* Cleaves, 15 N. H. 332, the defendant being owner of a ship, of which one Crane was ship's husband, the plaintiff furnished certain articles for the ship, charging them to the ship "Fortitude and owners," it not appearing that he knew who the owners were, and took from Crane his note for the amount due, giving him a receipt for the balance of the account. The defendants did not know how the plaintiff and Crane had settled the account, but they settled with Crane as if he had paid the plaintiff, who told Crane that he wished a note on which he could raise the money. He could not get the note discounted, and Crane afterwards became bankrupt. It was held that the note was not a payment of the account, and that the defendants were liable therefor. In order that a note should be a payment of a pre-existing debt, there must there be an express agreement, or circumstances from which such an agreement may be inferred.

If a man deals with another's agent, and gives the agent a receipt for a sum of money, which the agent has a right to pay, and on the faith of that receipt the principal settles with the agent and pays him money, the party giving him the receipt is concluded from looking to the principal, for he should have given him notice of the mistake. His only remedy is against the agent. Cheever *v.* Smith, 15 Johns. (N. Y.) 276.

This case differs from the one cited above in that here, the defendants relied upon the receipt given by plaintiff to their agent, whereas in the former, the defendants had no knowledge whatever of the nature of the settlement between their agent and the plaintiff, and even if they had had such knowledge they would still be liable, as the mere taking of a note did not amount to a discharge of a pre-existing debt.

transaction is that the seller, as an ultimate resource, looks to the credit of someone to pay if the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit; but if before the time comes for payment, or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller, behind the seller's back, of his credit. In the case of sale of goods to a broker, the principal, known or unknown, cannot, by paying or settling with his own agent before the time of payment comes, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. The payment or settlement to or with the agent can safely be made after the day of payment has arrived only in case a delay has intervened, which may reasonably lead the principal ★ to infer that [★ 524] the seller no longer requires to look to the principal's credit, *e. g.* such a delay as leads to the inference that the debt is paid by the agent, or that the seller elects to abandon his recourse to the principal and to look to the agent alone (*y*).

In the Court of Appeal the defendant relied upon certain *dicta* of Lord Tenterden, C. J., and Bayley, J., in *Thomson* v. *Davenport* (*z*), and the case of *Armstrong* v. *Stokes* (*a*). The *dicta* were to the effect that the right of the seller to sue the principal was subject to the qualification that the state of the account between the principal and the agent had not been altered to the prejudice of the principal, *i. e.* the payment to the agent would be answer to the claim by the seller. But these *dicta* were qualified by Parke, B., in *Heald* v. *Kenworthy* (*b*), where it was pointed out that there was nothing to preclude the seller recovering from the principal unless the former had in some way contributed either to deceive the latter, or to induce him to alter his position. In *Armstrong* v. *Stokes* (*c*) the seller had given exclusive credit to the agent, and the payment was made to the latter when the seller did not know of the existence of a principal.

Principal residence abroad.]—Where the principal is a foreigner resident abroad, there is no practical difference in the legal principles applicable. At one time it was contended that not only is the agent the person who is primarily liable, but that he is in general the only person liable. The true rule seems to be that, although the agent does not *primâ facie* pledge the principal's credit, evidence may be given to rebut this presumption (*d*).

The rule stated.]—Lord Tenterden stated the rule thus, in *Thomson* v. *Davenport* (*e*): "Where a British merchant is buying for a

(*y*) Per Bowen, J., *ubi supra.*
(*z*) 9 B. & C. 78.
(*a*) L. R., 7 Q. B. 598.
(*b*) 10 Ex. 739.
(*c*) *Supra.*
(*d*) See Elbinger Actien-Gesellschaft *v.* Claye, L. R., 8 Q. B. 313.
(*e*) 9 B. & C. 78.

foreigner, according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner." In *Mahony* v. *Kekulé* (*f*), which was decided in 1854, the question is treated as one of evidence. A written contract expressed to be made between V. and T. (the foreign principals) and the plaintiff was signed at [★ 525] the end by the ★ defendant as agent for V. and T. A verdict for the defendant was entered upon this issue. The court refused to grant a rule to enter this verdict for the plaintiff. Jervis, C. J., said: "In every case of contract it is a question of intention. If that be left in doubt, the circumstance of its being a foreign contract may be looked at. . . . The question, no doubt, is one of intention, to be collected from the contract. Ordinarily, where an English agent contracts on behalf of a principal residing abroad, the agents *primâ facie* considered to pledge his own credit, because it is highly improbable that the person he is contracting with would give credit to the foreigner. But that is not like this case. Here is a written contract, the meaning of which is to be collected from the face of it. It is expressed to be a contract between Vacher and Tilley and Mahony. But it is said that because it is signed at the end by Kekulé 'as agent for V. and T.,' therefore he is to be held liable. That, however, by no means follows. That is nothing more than an assertion that he had authority to make the contract for them." In a case decided by the same court two years afterwards (*g*), the same learned judge said: "I apprehend this court laid down the correct rule in the recent case of *Mahoney* v. *Kekulé*, that it is in every case a question of intention, to be gathered from the contract itself and the surrounding circumstances. No doubt, as has been said by learned judges more than once, the fact of the principal being a foreigner is entitled to some weight; but there is no rule of law that the agent is in all cases liable personally where the principal is a foreigner resident abroad. It is in all cases a question of intention, capable of being explained by the custom or usage of trade where any such can be shown to exist." The rule was also clearly stated by Justice Willes in the same case, where his lordship distinguished between oral and written contracts in the following terms: "Whether the defendant contracted as agent or not is a question of fact, as Baron Parke says in *Heald* v. *Kenworthy* (*h*), and not a conclusion of law. If a broker buys goods for a merchant, naming him, and stating that he lives in Australia, unless he at the same time stated that he was buying only as agent, the jury would be warranted in holding him to be personally liable. There is another class of cases, where custom my intervene and [★ 526] qualify the contract so ★ as to make the party resident in this country liable personally, though acting for a known foreign

(*f*) 14 C. B. 390.
(*g*) Green v. Kopké, 18 C. B. 549.
(*h*) 10 Ex. 739, 743.

principal. But where the contract is reduced into writing, we must gather from its context what was the intention of the parties; and here the question is whether the defendant so expressly contracts as agent as to exclude his personal liability." In effect these decisions of the Common Pleas are consistent with the statement of the rule by Baron Parke (*i*), who said: "The question of his liability is one of fact. Where the seller deals with an agent resident in this country and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. This is a question of fact and not of law."

Prima facie *agent of foreign principal does not pledge latter's credit.*]—The proposition that an agent, when acting for a foreign principal, does not *primâ facie* pledge the principal's credit, was laid down by the Court of Queen's Bench in 1872 (*k*) in exceedingly strong terms. "The great inconvenience," it was said, "that would result if there were privity of contract established between the foreign constituents of a commission merchant and the house supplied with the goods, has led to a course of business in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commission merchant buys by his order and on his account. It is true that this was originally, and in strictness perhaps still is, a question of fact." The court then touched upon the inconvenience of holding that privity of contract was established between a Liverpool merchant and the growers of every bale of cotton forwraded to him in consequence of his order given to a commission merchant at New Orleans, which, it is said, was so obvious as to justify the court in treating "it [probably the proposition or the presumption] as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituents' credit."

The Queen's Bench again approved of this statement of the law in *Elbinger Actien-Gesellschaft* v. *Claye* (*l*), which was decided in 1873. In that case the plaintiffs, a foreign company, ★ ne- [★ 527] gotiated with the defendant through commission agents for a supply to the plaintiffs of a number of railway wheels and axles. The contract was in writing, and entered into by the defendant and the English agents, no mention being made of the plaintiffs. The jury found for the defendant. Upon a motion for a new trial, which the court refused, it was intimated that there was no evidence whatever for the jury, inasmuch as the plaintiffs were no parties to the

(*i*) Heald *v.* Kenworthy, *supra.*
(*k*) Armstrong *v.* Stokes, L. R., 7 Q. B. 605.
(*l*) L. R., 8 Q. B. 313.

contract.[1] This decision affords a good illustration of the distinction drawn by Mr. Justice Willes (*m*).

Hutton v. *Bullock* (*n*) was the next case. There the defendant was a partner in the firm of H. B. and Co., trading at Rangoon. H. F. and Co., merchants in London, were supplied with goods by the plaintiff on their order. According to an arrangement between themselves and the Rangoon firm, the goods were shipped to Rangoon upon the joint account of the two firms. The firms were distinct, nor had plaintiff any knowledge either of the arrangement or even of the defendant. The court, being entitled to draw inferences of fact, came to the opinion, upon the evidence, that the London firm was to purchase the goods and charge commission, just as if the goods were consigned outwards on the sole account of the Rangoon firm, but that the consignment outwards should be for their joint account, and that this was not to alter in any way the mode in which the purchase was to be affected. Judgment was accordingly entered for the defendant.

The above decisions are all consistent with the principle adopted by the Common Pleas, namely, that in every case it is a question of intention; whereas the Queen's Bench, in introducing into its judgments the dictum that an agent cannot pledge his foreign constituents' credit without express authority so to do, and consequently that the absence of such authority renders any inquiry into the intention of the immediate parties unnecessary, would, if accepted, quite change the character of the question for the decision of the court.

Right of election—How destroyed.] — From what has already been said, it is manifest that when one of the parties to a contract is an agent, it frequently becomes of importance to determine whether [★ 528] the party with whom he contracts has, by ★anything he has done, become deprived of his right to elect to sue either the agent or his principal, assuming that such a right existed after the contract was entered into.

(*m*) *Supra*, p. 525.
(*n*) L. R., 8 Q. B. 331.

[1] "It has been sometimes said that where a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such a case the presumption at law is, that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is, that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof, other than the mere fact that the principal resided in another state or country." Bigelow, J., in Barry *v.* Page, 10 Gray (Mass.), 398. In this case the principal had not been disclosed at the time of the sale, yet was permitted to maintain an action in his own name for goods sold by his factor. To same effect see Tainter *v.* Prendergast, 3 Hill (N. Y.), 72. See also Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, and Merricks' Estate, 5 W. & S. (Pa.) 9.

Action brought after principal disclosed.]—When the agent contracts in his own name, disclosing his principal at the same time, either the principal or the agent may be sued upon the contract; but the defendant may show that his liability was put an end to by the plaintiff's election to sue the other party.[1] This, according to Mr. Justice Willes in *Calder* v. *Dobell* (*o*), was what was meant by Lord Tenterden, when he said, in *Thomson* v. *Davenport* (*p*), that, "if, at the time of the sale, the seller know not only that the person who is nominally dealing with him is not principal, but agent, and also know who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him alone, then according to *Addison* v. *Gandasequi* (*q*) and *Paterson* v. *Gandasequi* (*r*), the seller cannot afterwards, on failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other."[2] The question of election or no election is one of fact, and it is properly left to a jury to say whether the circumstances of a case negative or exclude liability of principal or agent, or substitute the liability of the one for that of the other (*s*).[3] Hence it follows that up to the moment of election two persons, principal and agent, may be severally liable upon the same contract (*t*). The fact that the agent mentions the name of the principal at the time the contract is made, or that the contract is on its face entered into in the name of the agent, or that payment due under the contract is demanded of the latter, does not make any difference in the liability of the parties. As to the last circumstance, Chief Justice Bovill (*u*) remarked that it was an equivocal act, and clearly matter for the jury. The effect of the cases is that a seller may make his election whenever the principal is discovered, and the only difference in principle between the case when the principal is disclosed, and where he is not disclosed, is that in the former case the election may be made at the very time the contract is made (*x*).

★ *Evidence of election.*]—It is clear, therefore, that [★ 529] questions of some degree of difficulty may be raised with reference to the evidence which is sufficient to show that a party contracting with an agent has elected which he will hold liable, the principal or

(*o*) L. R., 6 C. P. 494.
(*p*) 9 B. & C. 78.
(*q*) 4 Taunt. 574.
(*r*) 15 East, 62.
(*s*) Calder *v.* Dobell, *supra.*
(*t*) See *ib.*, per Mr. Justice Willes.
(*u*) *Ibid.*
(*x*) Per Mr. Justice M. Smith, *ib.*

[1] Cobb *v.* Knapp, 71 N. Y. 348; Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388, 394; Beymer *v.* Bonsall, 79 Pa. St. 298.
[2] See Wilmot *v.* Richardson, 4 Abb. App. (N. Y.) 614.
[3] Cobb *v.* Knapp, *supra.*

the agent. In the absence of any alteration of the account to the prejudice of the principal (*y*), it is well established that one contracting party, on discovering that the other contracting party was merely an agent for an undisclosed principal, has a right, within a reasonable time (*z*), to elect to proceed against the principal (*a*), unless in the meantime, with full knowledge as to who was the principal, and with the power of choosing between him and the agent (*b*), he had elected to treat the agent alone as his debtor. Until this election is made, either the principal or agent may be liable upon the contract. Here it becomes of importance to determine what act or conduct amounts to an election. In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge (*c*). Conclusive evidence of such an election is afforded by an action which has been proceeded with to judgment and execution even without satisfaction.

Election to sue—Explained.]—In *Priestly* v. *Fernie* (*d*), decided in 1865, an action had been brought against the captain of a ship for the non-delivery of goods pursuant to a bill of lading. The plaintiff recovered judgment. A *ca. sa.* was issued upon the judgment; the captain was arrested, and detained until he was made a bankrupt. The plaintiff then brought an action against the shipowner (the principal) for the same breach upon the bill of lading. By way of defence to this action was set up the previous proceedings against the captain. They were relied on as a conclusive election in point of law to hold the captain alone responsible, and to discharge the shipowner.[1] The court held that the second action

(*y*) Armstrong *v.* Stokes, L. R., 7 Q. B. 598.
(*z*) Smethurst *v.* Mitchell, 1 E. & E. 622; 28 L. J., Q. B. 241.
(*a*) Thomson *v.* Davenport, 9 B. & C. 78, 86.
(*b*) Addison *v.* Gandasequi, 4 Taunt. 574, and Paterson *v.* Gandasequi, 15 East, 62.
(*c*) See Calder *v.* Dobell, L. R., 6 C. P. 486, and observations of the court in Curtis *v.* Williamson, L. R., 10 Q. B. 59.
(*d*) 3 H. & C. 977; 34 L. J., Ex. 172.

[1] "Our law—while it gives an election to the creditor to sue either the master or the owner, in a distinct and separate action, does not preclude the creditor, by such an election, from maintaining another action against the party not sued, unless, in the first action he has obtained a complete satisfaction of the claim. Such is the general doctrine of our law; but it prevails only in the absence of any satisfactory proof that exclusive credit is given either to the owner or to the master; for it is perfectly competent for the parties to contract so as to confine the responsibility either to the master or to the owner. If, therefore, there is satisfactory proof that exclusive credit has been given to the one, the other will be completely discharged. Nay, the principle has been carried further; and it has been held, that if the party has so conducted himself in the particular transaction as to lead to the conclusion that an exclusive credit has been given either to the master or to the owner, severally, he will not be permitted afterwards to assert his claim to the prejudice of the party whom he has misled into the belief that he is exonerated." Story's Agency, §§ 295-6. See Kingsley *v.* Davis, 104 Mass. 178.

did not lie. It is a matter of easy inference, from the language used in the judgment in *Priestley* v. *Fernie*, that in order to afford conclusive evidence of an election, the action against the agent ★ should be proceeded with to judgment; but whether the [★ 530] judgment was satisfied the court thought immaterial. "If this," said Baron Bramwell, who delivered the judgment of the court, "were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment; there can be no doubt that no second action would be maintainable against the principal." By an election to sue was meant an election to "sue to judgment." The reason given being that an action against one might be discontinued, and fresh proceedings be well taken against the other.

Effect of proving against estate of insolvent agent.]—The question whether the first action should be proceeded with to judgment, to afford conclusive evidence of an election, was again raised in 1874 in *Curtis* v. *Williamson* (*e*), in which case the court held that the mere fact of filing an affidavit of proof against the estate of an insolvent agent of an undisclosed principal after that undisclosed principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor. The decision in *Priestley* v. *Fernie* was approved of, but, owing to the different facts, did not supply the *ratio decidendi*. Here the action was commenced against the agent, and the affidavit in bankruptcy had been made without any intention whatever to discharge the present defendants from responsibility. The court was therefore of opinion that it would be going much too far to hold that this was in point of law a binding election, though it might constitute, with other facts, some evidence of election to be submitted to a jury.

Duration of the right to elect.]—The judgment in *Priestley* v. *Fernie* brings out clearly another important point with respect to the liability of undisclosed principal and agent, and that is, that the right to sue, *i. e.*, to sue to judgment, is in the alternative. "The very expression that where a contract is so made," said Baron Amphlett, "the contractor has an election to sue agent or principal supposes he can only sue one of them, that is to say, sue to judgment." Then, turning to the other contention, his lordship points out that there is no authority for its support, but that there is one strong argument to the contrary, viz., that if a shipmaster (or agent) contracts under seal no action lies on the contract against the owners. Now if the master (or agent) made two contracts, one for himself and one ★ for his owners (the principals) his [★ 531] contract would not prevent the owners being sued on the other contract.

The House of Lords had occasion in *Kendall* v. *Hamilton* (*f*), which was decided in 1879, to discuss the principle of *Priestley* v.

(*e*) L. R., 10 Q. B. 57.
(*f*) L. R., 4 App. 504; 48 L. J., C. P. 704; 41 L. T. 418.

Fernie (*g*) and similar authorities. In the judgments delivered in that case will be found the reason of the rule. "I take it to be clear," said Lord Cairns, C., "that where an agent contracts, in his own name, for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestley* v. *Fernie* (*h*) may be mentioned. But the reasons why this must be the cases are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with, and given credit to the agent, should be dr ven to sue the principal if he does not wish to sue him; and on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal, who really had had the benefit of the loan, should be prevented from suing him if he really wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he (the agent) would have a right of action for indemnity against his principal; while, if the principal were liable to be also sued, he would be vexed with a double action. Further than this, if actions could be brought and judgments recovered first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts."

Effect of inserting agent's name in contract—Principal known.] —The mere insertion of the agent's name in a written contract, the principal's name being known at the time, is not conclusive evidence of an election on the part of the other contracting party [★ 532] ★ to look to the agent only. In *Calder* v. *Dobell* (*i*), decided in 1871, a broker was authorized by the defendant to buy cotton for him, but not to disclose his name. As the broker's credit was not good enough to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, the defendant. In the bought and sold notes the broker was named as the buyer. The broker sent to the defendant an advice note, informing him that the cotton was bought of the plaintiffs for him. The defendant did not repudiate the contract. The invoice was made out to the broker, but as the plaintiffs failed to obtain payment of C., they sued the defendant. At the trial, Mr. Justice Brett left the following questions to the jury:—1. Did the defendant authorize the broker to make the contract for him? 2. Did the

(*g*) 5 H. & C. 977.
(*h*) *Ubi supra.*
(*i*) *Supra.*

broker assume to make the contract for the defendant, and did the defendant, knowing this, ratify his act? 3. Did the plaintiffs, knowing that the broker was acting as agent for the defendant, elect to contract with the broker as principal, upon the terms of giving credit to him alone. The jury found the first and second questions in the affirmative; the third in the negative. A rule to enter a verdict for the defendant, or a nonsuit, or for a new trial on the ground of misdirection, was refused by the full court, whose decision was upheld in the Exchequer Chamber.

Summary.]—The following rules may be deduced from the authorities with certainty:—

(1.) Both principal and agent may be liable to the other contracting party in the alternative.

(2.) This alternative liability continues until the other contracting party elects to accept one of the two, the principal or the agent as his debtor.[1]

(3.) Whether there has been such an election is a question for the jury, subject to the direction of the judge.

(4.) But where the third party has sued the principal or agent to judgment, it is a conclusion of law that he has made his election (*r*).

(5.) In considering whether there has been a conclusive election or not it is immaterial whether the acts which are said to show an election have or have not been fruitless (*s*).

★(6.) Similarly in a case of tort, recovery of judgment [★533] against one joint wrong-doer, though unsatisfied, is a bar to an action against the others (*t*).

Rules of Stock Exchange.]—A principal who gives a broker authority to purchase on the Stock Exchange, is bound by the rules of the Stock Exchange as to such purchase, provided such rules are reasonable and legal (*u*), otherwise he will not be bound unless he has knowledge of the usage (*x*). A usage to ignore Leeman's Act (30 & 31 Vict. c. 29) is illegal, and therefore not binding without notice (*y*).

As to the powers which are implied in an agent's authority, and which he may exercise in a strict execution of his authority, thereby making his principal liable, see Book II. Part I.

Secondly, as to the liability of the principal where the agent exceeds his authority.]—Where the agent exceeds his authority, the

(*r*) See Calder *v.* Dobell, *supra.*

(*s*) Priestley *v.* Fernie, *supra;* King *v.* Hoare, 13 M. & W. 494; Kendall *v.* Hamilton, L. R., 4 H. of L. 504.

(*t*) Brinsmead *v.* Harrison, L. R., 7 C. P. 547; 41 L. J., C. P. 190; King *v.* Hoare, 13 M. & W. 494; Brown *v.* Wootton, 3 Cro. Jac. 731.

(*u*) Neilson *v.* James, 9 Q. B. Div. 546; Robinson *v.* Mollett, L. R. 7 H. L. 818; Perry *v.* Barnett, 15 Q. B. Div. 388.

(*x*) Seymour *v.* Bridge, 14 Q. B. D. 460.

(*y*) Perry *v.* Barnett, *ubi supra.*

[1] See Beymer *v.* Bonsall, 79 Pa. St. 298.

principal will not, as a rule, be liable; but where the principal, by his words or conduct, causes another to believe the existence of certain powers in the agent, and induces him to deal with the agent in that belief, the principal will not be allowed to plead the actual and express authority of the agent. As between the principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but, as between the principal and the agent, the true limit is the express authority or instruction given to the agent (*z*).[1]

General and special agents—Third parties.]—The further back the subject is traced in the law books, the more importance, it will be seen, is ascribed to the distinction between special and general agents in considering the liability of a principal on the contracts of his agents. The distinction, as has been already intimated, is not of prime importance in questions between the principal and third parties, inasmuch as a solution of the question whether an agency is special or general is involved in a solution of the question, What is the apparent scope of the authority? whereas a solu- [★ 534] tion of the latter question ★ is not involved in a solution of the former. There is no opposition between the two inquiries; the question whether an agency is special or general being in reality a part of the larger question, What is the apparent scope of the authority? The principle, it has been observed by a learned writer, which pervades all cases of agency, whether it be a general or a special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he held him out to the world to possess; although he may have given him more limited private instructions, unknown to the persons dealing with him. And this is founded on the doctrine, that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it (*a*). Where an agency is special or particular, and the principal has not, by his conduct or otherwise, extended the authority, the measure of the authority is the same in the case of the principal and third parties, and the principal and the agent. Where, on the other hand, the principal, by his conduct or otherwise, has, by the operation of the above principle, extended the authority so far as regards third persons, the

(*z*) See Book II., Part I., Ch. IV., p. 170.
(*a*) Story on Agency, § 127, note 2.

[1] Rice *v.* Goffman, 56 Mo. 434; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 18; Golding *v.* Merchant, 43 Ala. 705; Cruzan *v.* Smith, 41 Ind. 288; Home Life Ins. Co. *v.* Pierce, 75 Ill. 426; Adams Ex. Co. *v.* Schlessinger, 75 Pa. St. 246.

The test of a master's responsibility for the act of his servant is, whether the act was done in the prosecution of the master's business; not whether it was done in accordance with the instructions of the master to the servant; Cosgrove *v.* Ogden, 49 N. Y. 255.

authority of the agent, so far as concerns himself and his principal, may be unchanged.

The following cases are cited to show how far the liability of a principal is affected by an agent's violation of authority.

Statement of law by Buller, J.]—With respect to the distinction between special and general authority, Buller, J., said, in *Fenn* v. *Harrison* (*b*): "I agree with my brother Ashurst, that there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent. There is a class of cases which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants in driving their carriages against those of third persons; but those cases have been determined on the ground that it must be presumed that the servants ★ have acted under the orders of their mas- [★ 535] ters. But suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders, there is no authority which says that the master shall be liable for any injury done to another by such an act of the servant; though, indeed, if the master had ordered the servant to go a particular journey, and in the course of it the latter did an injury to some third person, the authorities which have been determined say that the master is liable in that case." It will be observed that the agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority, not because his authority is special or particular, but because the authority so limited and circumscribed and the apparent scope of the authority, are identical.

Servant authorized to buy for cash, buys on credit—Liability of master.]—The general rule to subject the principal to the act of the agent is that the agency must be antecedently given, or be subsequently adopted (*c*); there must in the latter case be some act of recognition. If A. authorizes B. to obtain credit of C. on A.'s account, and B. gets goods on such credit, A. is liable; where such an authority is given the principal will not be released by the fact that he afterwards gave B. money to discharge the debt, unless B. pays the money accordingly. Hence, where C. makes a claim against A., it is material to see when the money was given to B. "If the servant was always in cash beforehand to pay for the goods," said Lord Ellenborough (*d*), "the master is not liable, as he never au-

(*b*) 3 T. R. 761.
(*c*) See Book I., Ch. VII.
(*d*) Rusby *v.* Scarlett, 5 Esp. 76.

thorized him to pledge his credit; but if the servant is not so in cash, he gave him a right to take up the goods on credit, and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant his master." In another case a master sent his servant, who was used to transact affairs of that nature for him, with a note drawn on E., with orders to get from E. either bank bills or money, and turn them into Exchequer notes. The servant having other business of his master's upon his hands, went to B. and prevailed upon him to give him a bank bill for the note, and then, in pursuance of his master's orders, [★ 536] invested it in Exchequer notes, which he brought ★ to his master, not letting him know that B. cashed the note. E. failed on the following day. The question was upon whom this loss should light, B. or the master. Parker, C. J., at the trial was first of opinion that it should fall on B., because the servant acted contrary to orders, but ultimately changed his opinion. On argument the court was unanimously of opinion that the master was chargeable on the ground that the servant's general authority could not be determined for a time by any particular instructions or orders to which none but the master and servant are privy (*e*).

Warranty of horse by servant.]—In *Woodin* v. *Burford* (*f*), assumpsit was brought against the defendant on the warranty of a horse sold by his servant to the plaintiff. At the trial before Gurney, B., it appeared that the servant of the defendant, who was a horse-dealer, took the horse to the plaintiff's stables; that the plaintiff asked him what he knew about the horse, that he said the horse had a cough, but that the plaintiff would soon set that to rights. A receipt, containing a warranty, was then written out and signed by the servant, and this was produced in evidence, but the learned baron was of opinion that the servant was merely an agent for the purpose of delivering the horses and receiving the money, and nonsuited the plaintiff. A rule to set aside the nonsuit was refused. "Now," said Bayley, B., "what is said by a servant is not evidence against the master, unless he has some authority given him to make the representation, and the question in this case is, whether there is reasonable ground for inferring such authority. It is quite clear that before the time when the horse was delivered to the plaintiff and the receipt was given, there had been a bargain between the defendant and the plaintiff, and all that the servant was directed to do was to take the horse to the plaintiff and receive the money. It seems to me, that although a warranty given by a person intrusted to sell *primâ facie* binds the principal, yet the warranty of a person intrusted merely to deliver is not *primâ facie* binding on the principal, but an express authority must be shown." The distinction between the authority of an agent to deliver and receive the price and that of an agent to sell is obvious.

(*e*) Nickson *v.* Brohan, 10 Mod. 109.
(*f*) 2 Cr. & M. 391.

Jordan v. *Norton* (*g*) was a subsequent case. That was an ★ action for the price of a mare. It appeared that the [★ 537] defendant, having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted." The plaintiff agreed to sell her for the price. The defendant subsequently wrote to him again, "My son will be at W. on Monday, when he will take the mare and pay you; send anybody with a receipt and the money shall be paid, only say in the receipt sound and quiet in harness." The plaintiff wrote in reply, "She is warranted sound and quiet in double harness." The mare was brought to W. on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days and then returned her as being unsound. At the trial the learned judge directed the jury that the questions were whether the defendant had accepted the mare, and whether the son had authority to take her without a warranty. The jury answered both in the negative. A verdict for the defendant was supported by the Court of Exchequer. It was argued that there was a complete delivery to the son, who was the agent pointed out by the defendant himself to receive the mare, and the party with whom the plaintiff was to deal, and that the defendant was not entitled afterwards to object that the son had but a limited authority. "It is contended," said Parke, B., referring to this argument, "that the defendant is bound by the son's act on that occasion, but I think he is not, because the son had only a limited authority; and if a party contracts with another, through his agent, he can only take such rights as the agent can give, and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorized to receive the mare if a warranty were given that she was quiet in harness." The question did not arise in the case, otherwise this statement of the law would have been qualified to meet the cases where an agent's limited or special authority has been extended by the conduct of the principal.

Powers of attorney and letters of credit.] —The following cases illustrate the liabilities of grantors of powers of attorney and letters of credit (*h*):—

In *Withington* v. *Herring* (*i*), which was decided in 1829, an action was brought to recover a sum of money advanced to the defendants' agent in America. At the trial, before Best, C. J., ★ it appeared that the defendants entered into an agreement [★ 538] with A. to carry on for them certain mining speculations in America. They furnished him with instructions, a letter authorizing him to draw on them for 10,000*l.*, and a power of attorney "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem

(*g*) 4 M. & W. 155.
(*h*) See further, Book II, Part II, Ch. I.
(*i*) 5 Bing. 442.

necessary for that purpose." After having raised the 10,000*l.*, under the letter of authority, A. obtained of the plaintiff 1,500*l.*, which he applied to the defendants' use. For the amount he drew bills on the defendants, and indorsed them to the plaintiff. He did not show the letter of authority to the plaintiff; but there were no indorsements on it of sums previously raised, nor did it appear that the plaintiff knew that any money had been raised before by A. The defendants refused to accept the bills. The present action was then brought. The jury gave a verdict for the plaintiff, and found specially, (1) that it was the duty of the plaintiff to call for the power of attorney and letter of credit; (2) that there was no evidence whether he had done so or not; and (3) that there was no evidence of his having been informed that money had been advanced by others under the letter of credit. In support of a rule to set aside the verdict, it was urged, *inter alia*, that (1) where a power is accompanied by other instruments, the extent of the power must be collected from all the instruments taken together, and not from any one separately; (2) general expressions in a power are limited and restrained by the nature of the particular object of the power; (3) it is the business of every one who deals with an agent to satisfy himself of the nature and extent of the agents authority before he deals; and (4) if the plaintiff saw A.'s authority, his claim could not stand; if he might have seen the authority and did not, he must suffer for his own negligence. The court refused to disturb the verdict.

Best, C. J., said, "There is no ground for the alarm which it is supposed will be felt by the commercial world, for this is not a commercial transaction . . . . the jury have found that it is the duty of a party advancing money to an agent to look at his power of attorney and letter of credit; negativing thereby the necessity of calling for his letter of instructions; and properly too, because the agent's letter of instructions may contain communications which [539 ★] may be neither safe nor convenient to divulge. ★ If, therefore, the power of attorney and letter of credit did not constitute a sufficient authority for what A. had done, the plaintiff is not entitled to recover." But his lordship agreed with the rest of the court in thinking that the two instruments conferred a sufficient authority.

"I agree," said Gaselee, J., "with the rest of the court in the propriety of not disturbing the verdict. A. said the power lay separate for the purpose of inspection. I presume that persons in the situation of the plaintiff would look at the power before they advanced money, and it would be prejudicial to mercantile interest to restrain a power where the object in view requires an extensive authority. As to the inquiries which, it is alleged, the plaintiff ought to have made touching any sums advanced upon the letter of credit, it would have been useless to make them of A. who, of course would not disclose anything to defeat his own purpose, and impos-

sible to make them with success elsewhere." The letter of credit intrusted to the agent was addressed to him, and did not follow the form given in Beawes's "Lex Mercatoria," which, if followed by the defendants, would have prevented any difficulty arising. According to that writer, a letter of credit is addressed to A., B. or C. to advance the agent so much.[1]

Construction of documents—For the court.]—The construction of powers of attorney, and of all documents, is for the court and not for the jury; and the fact that the written instrument has been lost does not alter the rule. If parol evidence of its contents is received, its construction is still for the court (*k*).

Contract by letter of credit—Privity of contract.]—In *Re Agra and Masterman's Bank* (*l*), a bank gave to D. T. & Co. a letter addressed to them, and expressed thus—"No. 394. You are hereby authorized to draw upon this bank to the extent of 15,000*l.*, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back thereof." D. T. & Co. drew bills under this letter to the amount of 6,000*l.*, and indorsed them to the appellant, the Asiatic Banking Corporation, who duly indorsed particulars on the letter of credit. ★ The bank was afterwards ordered to be wound up be- [★ 540] fore the bills were presented for acceptance, and D. T. & Co. were indebted to the bank to an amount exceeding what was due on the bills. The claim of the appellant to prove for the amount of the bills, and the winding-up of the bank, was resisted, on the ground that D. T. & Co. were indebted to the bank as mentioned above. In the argument, the right of the appellant to prove was put on three grounds—(1) that D. T. & Co. were agents authorized by the bank to promise that the latter would accept the bills; (2) that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank to accept the bills; (3) that it would be a fraud on the part of the bank to deny their liability to pay the bills, after they had been taken on the faith of the letter. The Court of Appeal reversed the decision of Wood, V.-C., and held, that whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and D. T. and Co., and that the appellant was entitled to prove for the amount due on the bills, without regard to the state of the account between the bank and D. T. & Co. Sir H. M. Cairns, L. J., said, "If it be necessary to determine the question of the legal liability of the Agra and Masterman's Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the

(*k*) Berwick *v.* Horsfall, 4 C. B., N. S. 450; 27 L. J., C. P. 193.
(*l*) L. R., 2 Ch. 391.

[1] Davidson *v.* Porter, 57 Ill. 300.

Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra and Masterman's Bank, in favour of the Asiatic Banking Corporation." Sir G. T. Turner, L. J., was equally of opinion that the whole effect of the letter was that the Agra bank held out to the persons negotiating the bills a promise that it would pay the bills, and that it was impossible to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. Cairns, L. J., intimated that the cases as to the offer of rewards such [★ 541] as *Williams* v. *Carwardine* (*m*), *Denton* v. *Great* ★ *Northern Rail. Co.* (*n*), *Warlow* v. *Harrison* (*o*), and *Scott* v. *Pilkington* (*p*), were sufficient authorities to show that there might be privity of contract between the bank and the appellant, and cited the view taken by the American courts, viz., that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, as tending to the same result.

Bill of Exchange drawn under letter of credit.]—The above decision was applied by James, V.-C., to the case of *Maitland* v. *The Chartered Bank of India* (*q*), the propositions deducible from which are:—

1. That a *bonâ fide* holder of a bill of exchange, drawn under an an open letter of credit, and taken by him on the faith of such letter of credit, has a right of action at law against the grantor of the letter of credit in case of his refusal to accept the bill;
2. That the right of a *bonâ fide* holder for value cannot be affected by any private arrangement between the grantor and grantee of the letter, of which the holder has no notice;
3. *Semble*, that the rights of such holder are not affected by the existence of a custom or course of dealing that a grantee, being a foreign firm, can only obtain letters of credit upon the guarantee of some English firm, and that such grantee stipulates to use the letters of credit only for the purpose of buying goods to be consigned to England, and to transmit the bills of lading to the English firm as a security for the repayment of the bills of exchange drawn under the letters of credit.

Open letters of credit—Evidence of.]—Whether a document is or is not an open letter of credit is a question for the jury. To this effect it was said by Brett, L. J., in *The Union Bank of Canada* v. *Cole*, "If it is urged that this is an open letter of credit, I should

(*m*) 4 B. & Ad. 621.
(*n*) 5 E. & B. 861.
(*o*) 1 E. & E. 295, 309.
(*p*) 2 B. & S. 11.
(*q*) 2 H. & M. 440; 38 L. J., Ch. 363.

protest that we have not enough evidence before us to decide that point. If that is the real question in the case, it ought to have been submitted to a jury." It has been urged, on the other hand, that it could not be an open letter, inasmuch ★ as it was [★ 542] addressed to an individual. "But," his lordship continued, "I cannot go so far as to say that no document could be an open letter if addressed to an individual. If that which is asserted to be a letter of credit is addressed to all the world, then those who act upon it have, in fact, the advantage of an actual legal contract with the giver of the letter—an actual contract either because it was intended by the giver of the letter that they should act upon it, or because he has so acted that persons dealing with him would have a right to infer that he so intended. Then, whether he intended or not, on ordinary principles of law he becomes bound."

Open and special letters of credit.]—The distinction between open and special letters of credit was much insisted upon in the above case; the nature of such distinction may be inferred from the remarks of Turner, L. J., in *Re the Agra, &c., Bank* (*r*): "The letter was written in a double form. The first part of it contains the authority which is given to D. T. & Co. to draw the bills; the second part is evidently, though not in terms, yet in substance, addressed to the persons who are to negotiate the bills." In *The Union Bank of Canada* v. *Cole* (*s*), which was decided in the year 1877, the Court of Appeal discussed some important questions with respect to the rights and liabilities of third persons and principals, arising out of documents in the form of letters of credit. Documents in that form were addressed by the defendants to S. & Co., corn merchants, authorizing them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened, without performing the conditions. The plaintiffs, having notice of the conditions and knowing that they were unfulfilled, advanced money on the bills so drawn. The defendants refused to accept them. An action for the nonacceptance was then brought. The court held that whether the documents were letters of credit or not, they were subject to such of the conditions as were not necessarily subsequent to the advance. "The defendants," said Bramwell, L. J., "had no contract with the plaintiffs, and no obligation other than to accept such bills as Stevenson was entitled to draw, except so far as Stevenson was bound by a condition subsequent. Then ★ arises this dilemma: [★ 543] either there was no letter of credit, and S. had no authority to create a relation between the plaintiffs and the defendants which would make the defendants liable, or S. had power to create a limited relation between them, which must be interpreted by the terms subsisting between S. and the defendants, and if those terms were not complied with, there would be no liability."

(*r*) *Supra.*

(*s*) 47 L. J., C. P. 100.

This case is easily distinguishable from *Re the Agra, &c. Bank.* Commenting upon the latter case, Cotton, L. J., observed that, "the Lord Chancellor decided in favour of the bill holder on two grounds, either that there was a direct contract between the bill holder and the givers of the letter, or that the bill holder was assignee of the person to whom the letter was given.

"Now in this case it cannot be contended that the plainiiffs can recover as assignees of a contract. If they claim as assignees, they must take the contract in its entirety, and stand in Stevenson's position; and all the clauses and terms of the agreement must be taken into consideration. But it is clear that some of the conditions have been broken, even though it may be it was impossible for the defendants to have fulfilled them. In this respect the case is entirely different from that before Lord Cairns. In that case there were no conditions, but an attempt was made to defend the suit on the ground that the person to whom the letter was given was indebted to the defendants, and it was held that they had contracted themselves out of the right to set off such debts. The contract was made with all the world, so that anyone could take advantage of it unconditionally."

Effect of notice that agent is violating his instructions.]—It may be laid down, lastly, that although a principal cannot, by secret limitations of an agent's apparent authority, free himself from liability upon contracts of the agent based upon his apparent authority, yet this rule will have no operation where the third party has notice that the agent is acting in violation of his instructions (*t*).

Ratification.]—Thirdly, as to the liability of the principal where he has ratified an unauthorized act or contract of the principal, see the chapter on Ratification.

[★ 544] ★ *Contracts in name of agent.*]—Fourthly, as to the liability of the principal where the agent contracts in his own name.

With reference to his liability on instruments under seal, bills of exchange and promissory notes, see Book II., Part II.

The rule with reference to the liability of principals upon all parol contracts, except negotiable instruments, is that it is determined by the answer to the question—To whom was credit given? See what is said on the subject of election in Section 1 of this chapter.

Where agent is principal also—Usage in the case of brokers.]—There now remains for consideration, fifthly, the liability of the principal where the third party and the agent are identical; in other words, where an agent who has been employed to contract with others assumes himself to contract with his principal.[1] This question was raised in 1870 in the case of *Mollett* v. *Robinson* (*u*). The defendant, a Liverpool merchant, employed the plaintiffs as

(*t*) See Howard *v.* Braithwaite, 1 Ves. & B. 209.

(*u*) L. R., 5 C. P. 646; 7 *ib.* 84; 7 H. L. 802. See White *v.* Benekendorf, 29 L. T. 475.

[1] See *ante* Book 3, Chap. 3, §§ 2, 3.

brokers, to buy tallow in the London market. The plaintiffs, acting in accordance with the usage of the London market and having other commissions to execute, bought the whole quantity in the aggregate, and bought and sold notes were interchanged between the sellers and the plaintiffs. The principals' names were not disclosed on either side. By these notes contracts were made between the plaintiffs and the sellers, by which each became personally bound to the other. The plaintiffs sent the defendant a bought note signed by themselves as sworn brokers. No seller's name was mentioned. In an action for refusing to accept the tallow or to indemnify the plaintiffs, evidence was given on the part of the plaintiffs of an universal usage in the tallow trade for brokers to make the contracts in their own names, upon which they became personally liable, and to make such contracts for the aggregate quantity of tallow for which they might have received orders, and then at the prompt-day to balance and settle the deliveries and payments with their sellers, and either to make deliveries to their principals, or, if delivery was not taken by them, to claim any difference which might arise from a fall in the market from the respective principals. The defendant was not aware of the usage or of the way in which the tallow had been bought until ★ after he received the [★ 545] bought note. When he learnt the real nature of the transaction he refused to adopt it. At the trial before Bovill, C. J., a verdict was taken for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit.

In the Common Pleas it was argued that the usage relied on contradicted the contract on the face of the bought note. The argument was heard by Bovill, C. J., Montague Smith, Willes and Keating, JJ., of whom the two former held that the defendant was bound by the usage, although he was ignorant of its existence; Willes and Keating, JJ., on the other hand, were of opinion that although a usage may control the mode of performing a contract, it cannot change its intrinsic character; and as the authority given by the defendant to the plaintiffs was to buy for him as brokers and to sell to him as principals, the defendant was not bound to accept the tallow.

Willes, J., who delivered the judgment of himself and Keating, J., said: "A broker is entitled to indemnity only for what he does within the limit of his authority. Here the authority of the brokers was to buy as brokers for their principal, not to sell to him. If the sale had been consummated in the course insisted upon by the brokers, the principal would have obtained goods and paid for them; that is, would have bought them. Of whom? Of his own brokers, and no one else. That ought not to be, without the knowledge and consent of the principal. It is an axiom of the law of principal and agent, that a broker employed to sell cannot himself become the buyer; nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may

object if he think proper. A different rule would give the broker an interest against his duty,—to pass off a bargain or inferior goods. It is also an elementary proposition, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. It may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal be unaware of such usage; because [546 ★] every authority to ★ do a thing, not specifying the way, implies authority to do it in a reasonable way, which the usual way *primâ facie* is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller." As the court was equally divided the verdict stood.

In the Exchequer Chamber the court was again divided, Kelly, C. B., Channell, B., and Blackburn, J., holding that the defendant was bound by the usage; Mellor and Hannen, JJ., and Cleasby, B., being of a contrary opinion. In the House of Lords the judges, and, in addition to those named, Brett and Grove, JJ., and Amphlett, B., gave their opinions upon the question, whether the judgment of the Courts of Common Pleas and Exchequer Chamber were right. The two former answered the question in the negative, the latter in the affirmative.

The appeal in the House of Lords was heard by Lord Cairns, C., and Lords Chelmsford, Hatherly, and O'Hagan, who were unanimous in reversing the decisions of the courts below. "The effect of this custom," said Lord Chelmsford, "is to change the character of a broker, who is an agent to buy for his employer, into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market, with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their instrinsic character. It was not contended in the present case that if the respondents were employed in the ordinary character of brokers they had performed their duty to their employer. Of course, if the appellant knew of the existence of the usage, and chose to employ the respondents without any restriction upon them, he might be taken to have authorized them to act for him in conformity to such usage." His lordship doubted whether the usage applied to the case at all, but if it did, he did not hesitate to say that it would not apply in the case of a person ignorant of its existence, inasmuch as by converting the broker employed to buy into a principal selling for himself, it gave him an interest wholly opposed to his duty. An analysis of the judgment shows that of the thirteen judges, apart from the law

lords, whose opinions were given upon the case, seven supported ★ the view which ultimately prevailed, viz., Willes, [★ 547] Keating, Mellor, Hannan and Brett, JJ., and Amphlett and Cleasby, BB.

SECT. 2—*For Fraud and Misrepresentation of Agent.*

Benefit received from fraud of agent—Liability of principal.]—The rule of law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority, or where the fraud was committed by the agent in the course of his principal's business and for his benefit, has been laid down by Lord Holt in *Hern* v. *Nichols* (*x*); by Lord Ellenborough, in *Alexander* v. *Gibson* (*y*); by Baron Parke, in *Cornfoot* v. *Fowke* (*z*), although, under the circumstances of the case, he held the defendant not liable (*a*); and in *Moens* v. *Hayworth* (*b*); by Chief Justice Tindal and the other judges of the Exchequer Chamber in *Wilson* v. *Fuller* (*c*); and again by the Court of Exchequer in *Udell* v. *Atherton* (*d*), where the Court was divided in opinion upon other points; and by the Privy Council, in *Mackay* v. *Commercial Bank of New Brunswick* (*e*), where their lordships state they regard the rule as settled law.[1]

Principal liable civilly, not criminally.]—*Hern* v. *Nichols* (*x*), decided in 1709, was an action on the case for deceit. The plaintiff set forth that he bought several parcels of silk of the defendant as

(*x*) 1 Salk. 289.
(*y*) 2 Camp. 555.
(*z*) 6 M. & W. 373.
(*a*) See Barwick *v.* English Joint Stock Bank, L. R., 2 Ex. 547.
(*b*) 10 M. & W. 157.
(*c*) 3 Q. B. 77.
(*d*) 7 H. & N. 172; 30 L. J., Ex. 317.
(*e*) L. R., 5 P. C. 394.

[1] Rhoda *v.* Annis, 75 Me. 17; Concord Bank *v.* Gregg, 14 N. H. 331; Fitzsimmons *v.* Joslin, 21 Vt. 129; Fogg *v.* Griffin, 2 Allen (Mass.), 1; White *v.* Sawyer, 16 Gray (Mass.), 586; Jewett *v.* Carter, 132 Mass. 335; Morehouse *v.* Northrop, 33 Conn. 380; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Sanford *v.* Handy, 23 Wend. 260; Bennett *v.* Judson, 21 N. Y. 238; Crans *v.* Hunter, 28 N. Y. 389; New York & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Davis *v.* Bennis, 40 N. Y. 453; Hunter *v.* Hudson River Iron, &c., Co., 20 Barb. (N. Y.) 493; Mundorf *v.* Wickersham, 63 Pa. St. 89; Eilenburg *v.* Protection & Mut. Fire Ins. Co., 89 Pa. St. 464; Torrie *v.* Parkersburg, &c., R. R., 39 Md. 36; Lynn *v.* Balt. Ohio R. R., 60 Md. 404; Reeves *v.* State Bank, 8 Ohio St. 465; Madison R. R. *v.* Norwich, 24 Ind. 457; Wolfe *v.* Pugh, 101 Ind. 293; Law *v.* Grant, 37 Wis. 548; White *v.* Wabash, &c., R. R., 64 Iowa, 281; Crump *v.* U. S. Mining Co., 7 Gratt (Va.), 352; Tagg *v.* Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479; Lane *v.* Black, 21 W. Va. 617; Morton *v.* Scull, 23 Ark. 289; Peebles *v.* Patapsco Guano Co., 77 N. C. 233; Reynolds *v.* Witte, 13 S. C. 5; Scofield Rolling Mill Co. *v.* State, 54 Ga. 635; Bowers *v.* Johnson, 18 Miss. 169; Lawrence *v.* Hand, 23 Miss. 103.

this case, as there was no proof of the agent's authority. "If," he continued, "the plaintiff knowing of the nuisance expressly authorized the agent to state that it did not exist, or to make any statement of similar import; or if he purposely employed an agent ignorant of the truth in order that such agent might innocently make a false statement, believing it to be true, and might so deceive the party with whom he was dealing, in either of those cases he would be guilty of a fraud and the truth of the plea would then, I think, have been established."

Baron Alderson laid stress upon the fact that the agreement, being in writing, nothing could be added to or taken from its terms. "If indeed the principal had intrusted his agent," said he, "to make a false statement, this would be so (*i. e.*, the principal would be liable). It may perhaps be admitted that such a statement, if made part of the original written contract, would be within the scope of the general agency here shown to exist. But the contract is in writing, and this is no part of it. And I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any; the principal because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it: and the agent, because though he made a misrepresentation, he did not know it to be one at the time he made it, but gave his answer *bonâ fide*." Baron Parke concurred, and confined himself in a great measure to the technical question. "But it is said," he remarked, "and I think justly said, that it is not enough to support the plea that the representation is untrue; it must be proved to have been fraudulently made. As this representation is not embodied in the contract itself, the contract cannot be affected unless it be a fraudulent misrepresentation, and that is the principle on which the plea is founded. "The notes taken at the trial did not state what was the agent's authority. Lord Abinger dissented from from the view of the majority, and Baron Alderson pointed out in a subsequent case (*r*) that the only real difference between the Chief Baron and the rest of the court was upon the question whether the particular representation was so far part of the contract as to vitiate it; and the same learned judge [★ 551] also pointed out that the action would clearly ★ not have lain in this case if the facts had been like those found in *Wilson* v. *Fuller* (*s*). Mr. Justice Willes, in a subsequent case (*t*), expressed an opinion that he should be sorry to have it supposed that this case turned upon anything but a point of pleading.[1]

(*r*) Wilson *v.* Fowler, 3 Q. B. 73.
(*s*) *Infra*.
(*t*) Barwick *v.* English Joint Stock Bank. L. R., 2 Ex. 262.

[1] In commenting upon this case. in Fitzsimmons *v.* Joslin, 21 Vt. 140, Redfield, J., said : "The case of Comfoote *v.* Fowke is certainly a most remarkable instance of self-delusion, brought about by the severity of one's own discriminations. Lord Abinger, who dissented from the opinion of the major-

The decision in Cornfoot *v.* Fowke *examined.*]—In this case it will be observed that the real ground of the decision of the majority appears to have been based on the principle that parol evidence can-

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ity of the judges, seems to have readily comprehended the delusion under which his brethern were laboring as indeed he always did in all intricacies of thought or language. But when the majority of a court of law gravely tell us, that, in a case where the defendant has been most grossly deceived and cheated by the false representations of the plaintiff's agent, which the plaintiff himself knew to be false, but did not expect the agent would make, but which became essential to induce the defendant to make the contract, and were consequently made by the agent at a venture, and the plaintiff after knowing the facts, still persists in enforcing the contract, it should be said the defendant is liable, because there is no fraud on the part of the plaintiff—none on his own part, because *he made no representations*, and none on the part of the agent, because *he did not know them to be false*—it is certainly not a little calculated to shake our reliance upon human judgment and discrimination. One is almost compelled to doubt if indeed these men can be serious. It almost strikes the mind as a matter of mere *badinage*. It is scarcely surpassed, in its ethical or metaphysical acumen, by the sophistry of the ancient schoolmen, by which it was attempted to be proved, by syllogistic reasoning, that in a foot race Hercules could never overtake the lobster. This whole subject is placed in the clearest possible light by Lord Denman, in Wilson *v.* Fuller, in 43 E. C. L. 634, in these lines: 'We think the principal and his agent are, for this purpose, completely identified, and that the question is not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them.' That rule applied to the case of Comfoote *v.* Fowke would have led to the same sensible conclusion, to which Lord Abinger came—'That whether there was a moral fraud or not, if the purchaser was actually deceived in his bargain the law will relieve him from it.' It is true that the case of Wilson *v.* Fuller, where the Court of King's Bench adopt the reasoning of Lord Abinger in Comfoote *v.* Fowke, was itself reversed in the Exchequer Chamber, but merely upon the ground that in that case the purchaser did not rely upon the representations of the agent, but upon his own knowledge of the subject and the general custom of the place. It is, therefore, I think, impossible to say that the case of Comfoote *v.* Fowke has been followed or to believe that it can be generally adopted by the courts of common law either in England or in this country. The cases must revert and can only find secure repose upon the old basis, that a contract, superinduced by substantial fraud, entering into the very framework and basis of the contract, and without which it would not have been made, cannot be enforced against the party thus misled, whether the fraud originated with the other party or his agent, whether it were concerted by the principal or adopted by him. If, indeed, as was held in the Exchequer Chamber, in Wilson *v.* Fuller, *supra*, a party fall into a delusion for want of proper examination, and by a rash confidence in his own knowledge or sagacity, the law will not relieve him from his contract."

See also Coddington *v.* Goddard, 16 Gray (Mass.), 436. In this case a broker through whom an offer was made in Boston by a principal doing business in New York for the purchase of a quantity of copper was asked by the seller whether intelligence had been received in New York of any advance in the price of copper in Europe, and replied "None that I know of," and the seller then agreed to sell upon the terms proposed by the broker. Intelligence of such advance in price had in fact been received in New York, and was known to the broker's principal there before the contract was made, but was not known to the broker, and this intelligence would have been of material importance to the seller in determining whether he would sell on the terms proposed. The court held that this was not a case in which an agent made an absolute representation of a material fact which he believed to be true, but which was in fact false and known to be so by his principals. Here the agent ex-

not be given to vary or contradict a written contract. Lord Brougham remarked, in *The National Exchange Company of Glasgow* v. *Drew* (*u*), "*non constat* that the employer has not told the agent and desired him to apprise the purchaser. It was the over-zeal of the agent, for which the principal was not to suffer." This explanation of the decision, however, cannot be regarded as satisfactory. Nor, indeed, is it much more satisfactory to say that the case turned merely upon a point of pleading, inasmuch as points of pleading may involve substantive law. If the decision is of any authority, it is an authority for the proposition that a false representation by an agent, involving no moral fraud, which representation is not embodied in the written contract, will not prevent the principal from enforcing that contract, although aware that such a representation would be false, there being no proof that he had authorized the agent to make such representation, or that he had purposely employed an agent ignorant of the truth, so that the false statement might be innocently made.

The law stated by the Court of Appeal.]—*Cornfoot* v. *Fowke* (*x*) was discussed in *Ludgater* v. *Love* (*y*), determined by the Court of Appeal in 1881. This was an action for a fraudulent misrepresentation made to the plaintiff by the defendant's son, acting for and on behalf of the defendant, to the effect that certain sheep which the plaintiff purchased from the defendant's son were all sound, whereas they were not. This was a new trial. The first had resulted in a verdict for the plaintiff; but the Court of Appeal granted a new trial on the ground that there was no sufficient evidence of authority from the father to the son to make the representation complained of. At the second trial before Denman, J., the jury found [★ 552] (1) that the ★ defendant's son represented the sheep to be all right; (2) that he had the defendant's authority to make the representation; (3) that the defendant fraudulently authorized his son to represent that the sheep were all right knowing them to have the rot; (4) that the defendant fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound, so as to obtain the best price for them; and (5) that the plaintiff was materially influenced towards buying

(*u*) 2 Mac. 109.
(*x*) *Ubi supra.*
(*y*) 44 L. T. 694; 45 J. P. 600.

pressed merely his own knowledge of the fact. He did not state positively whether such information had been received in New York or not. The contract was accordingly held valid and could be enforced against the seller. The vendor of land is responsible for material misrepresentations in respect to its location and qualities made by his agent without express authority, and in the absence of any actual knowledge by either the agent or the principal, whether the representations were true or false. One who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as if he knew it to be untrue. Bennett *v.* Judson, 21 N. Y. 238.

the sheep by a representation that the sheep were all right. Upon these findings a verdict was entered for plaintiff. A rule for a new trial granted by the Common Pleas Division was discharged by Grove and Lindley, JJ. The defendant appealed. The Court of Appeal, consisting of Lord Selborne, C., and Baggallay and Brett, JJ., affirmed the judgment of the court below.

The appellant contended that *Cornfoot* v. *Fowke* (*z*) was determined on the ground that the fact that an agent makes a statement which he knows to be false, does not make the principal liable, unless there is evidence that the principal authorized the agent to make the statement; and that where a purchaser has been induced to buy by the fraud of the agent of the vendor he may rescind the contract, or he may bring an action of deceit against the agent personally, but he cannot sue the principal. Obviously neither of these propositions was conclusive upon the question that might be raised where a vendor employed an agent ignorant of the truth, in order that such agent might innocently make a false statement. This question was touched upon incidentally by the judges who decided *Cornfoot* v. *Fowke* (*a*).

Lord Selborne, C., in giving his judgment, confined his observatons almost entirely to a quotation from the judgment of Lord St. Leonards in *National Exchange Co.* v. *Drew* (*b*). The quotation is as follows:—"If in that case fraud had not been alleged, but it had been put upon misrepresentation, and the facts were that a man, knowing that there is so serious a nuisance affecting a house as to diminish its value in such a way ★ that no man of respect- [★ 553] ability could live in it, takes care himself not to make the contract, but leaves it to an agent whom he has no reason to suppose to be aware of the fact; and if, in the course of the treaty for the contract, the agent being asked if such a fact existed, states positively 'no,' and the contract is executed in silence upon the point, because the purchaser's or the tenant's vigilance has been lulled to sleep upon it, and he believes the representations made to him by the agent. . . . I should feel no hesitation, if I had myself to decide that case, in saying that though the representation was not fraudulent—the agent not knowing that it was false—yet that as it in fact was false, and false to the knowledge of the principal, although the agent did not know it, it ought to vitiate the contract."

Error of house-agent no fraud.]—*Wilson* v. *Fuller* (*c*), decided in 1843, was another action in deceit. In that case, the principal authorized her agent to sell certain premises, which were held by her tenant at a rent of 100*l* a year. The fraudulent representation consisted in the allegation that this rent was clear of rates and taxes. The jury found that she knew of the deduction; that she

(*z*) 6 M. & W. 358.
(*a*) By Rolfe, B., at p. 370; by Alderson. B., at p. 372; by Parke, B., at p. 373.
(*b*) 2 Macq. 145–6.
(*c*) 3 Q. B. 68.

was not communicated to the plaintiff, who supplied oats to the value of 122*l.* 7*s.* Money to the amount of 2,676*l.* was paid by A. into the bank. A. drew a cheque in favour of the plaintiff for the amount of the oats, but it was dishonoured by the defendants, who claimed to retain the whole sum of 2,676*l.* in payment of A.'s debt to them. The judge ruled that there was no evidence to go to the jury, and directed a nonsuit, but signed a bill of exceptions, setting out the evidence, It was urged in support of the ruling, that it was not the manager's duty to disclose voluntarily (*i*), and that a principal is not liable for a false representation by the agent (*k*). The court, consisting of Justices Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, unanimously decided—first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so; secondly, that the bank would be liable for such fraud; and, thirdly, that the fraud was properly charged in the declaration as the fraud of the bank. [★ 556] "With respect to the question," said Mr. Justice ★Willes, who delivered the judgment of the court, "whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved. . . . It is said, if it be established that the bank is answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. . . . If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. This was the decision in the case of *Raphael* v. *Goodman*" (*l*). The doctrine laid down in *Barwick* v. *English Joint Stock Bank* was subsequently followed by the Court of Queen's Bench (*m*), (whose decision was reversed on appeal, on the ground that the signature of the manager was not the signature of the company within 9 Geo. 4, c. 14, s. 6); and adopted by the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick* (*n*).

Payments obtained by agent's fraud.]—The principle of the above cases was again confirmed, in 1877, by the Privy Council in *Swire* v. *Francis* (*o*). In that case S., being employed by the respondent to

(*i*) Hamilton *v.* Wright, 12 Cl. & F. 109; but see Lee *v.* Jones, 34 L. J., C. P. 131.

(*k*) Cornfoot *v.* Fowke, 6 M. & W. 358; Udell *v.* Atherton, 7 H. & N. 172; Wilde *v.* Gibson, 1 H. L. C. 605.

(*l*) 8 A. & E. 565.

(*m*) Swift *v.* Winterbotham, L. R., 8 Q. B. 244 (1873). See L. R., 5 P. C. 412.

(*n*) L. R., 5 P. C. 394; Swire *v.* Francis, 37 L. T. 554.

(*o*) L. R., 3 App. Cas. 106.

carry on his business, credited the respondent in account with the appellants with the sum of 5,800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill, in the name of the respondent's firm, on the appellants for the balance of account, and having received the proceeds of such bill, including the said 5,800 taels, appropriated them to his own use. The question for the court being whether the respondent was liable to the appellants in the above sum, with interest from the date of its receipt by S., the court held that the proceeds of the bill having been received in the manner above mentioned by S., acting throughout within the scope of his authority, belonged to the respondents; and that as ★ he had been paid 5,800 taels without consideration, the [★ 557] appellants were entitled to recover them back. "It is not to be assumed," said Sir R. P. Collier, who delivered their lordship's judgment, "that he (S.) was authorized to commit a fraud by making the false entry of the advance of 5,800 taels; but it would be within the scope of his authority to make an advance of that kind, and to enter it in the account when made." The case was therefore held to fall within the principle stated by Willes, J., in *Barwick* v. *The English Joint Stock Bank;* and the doctrine laid down in *Mackay* v. *Commercial Bank of New Brunswick.*

Statement of the law by the Privy Council.]—The two last cases were much discussed in *Mackay* v. *Commercial Bank of New Brunswick* (*p*). In that case an officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to the plaintiffs which, by omitting a material fact, misled and induced them to accept a bill in which the bank was interested. The plaintiffs were compelled to pay the bill. They accordingly brought an action of deceit against the bank. The Privy Council determined the appeal in the plaintiffs' favour. Sir Montague Smith, who delivered the judgment of the court, said, with reference to the allegation that the agent had no implied authority to commit a fraud, "It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that in mercantile transactions principals do not authorize their agents to act wrongfully, and, consequently, that frauds are beyond the scope of the agent's authority in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words." With respect to ex-

(*p*) L. R., 5 P. C. 594.

pressions used by Lord Chelmsford and Lord Cranworth in *Addie* v. *The Western Bank of Scotland*, to the effect that an action of deceit is not maintainable against a corporation in respect of the [★ 558] fraud of its agents, their lordships ★ did not regard the *dicta* as necessary to the decision. Lord Cranworth admitted in that case that if third persons have been defrauded by the agents of an incorporated company, the company may be made responsible to the extent to which its funds have profited by these frauds. Upon this it was remarked by their lordships, "that if the fraud by which the corporation benefited consisted of a misrepresentation not forming part of or leading to a contract with it, it is difficult to see how in many cases they could be made responsible, except in an action for deceit. . . . Unless the remedy against a company in respect of the fraud of its agent is to be confined to cases where the fraud is part of a contract, and the contract can be rescinded so as to place the parties *in statu quo*—a doctrine much narrower than that laid down by Lord Cranworth—it appears to their lordships to follow that an action of deceit is maintainable, wherever, as laid down by the Exchequer Chamber (in *Barwick* v. *English Joint Stock Bank*), the fraud of the agent may be treated for the purposes of pleading as the fraud of the principal. Nor do they see any valid reason for exempting incorporated more than unincorporated companies from this action." The Privy Council reversed the judgment of the court below, which was in favour of the Commercial Bank.

Ratio decidendi *of* Barwick *v.* English Joint Stock Bank.]—In *Weir* v. *Bell* (*q*), decided in 1878, Bramwell, L. J., dissented from the reasoning in *Barwick* v. *English Joint Stock Bank* (*r*), and suggested that the true *ratio decidendi* of such cases is this:—Every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.

In *The British Mutual Banking Co.* v. *The Charnwood, &c., Co.* (*s*), a case decided in 1887, the Court of Appeal, reversing the decision of Manisty and Mathew, JJ., held that a principal is not liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed not for the general or special benefit of the principal, but for the servant's or agent's private ends. "I know of no case," said Lord Esher, M. R., "where the employer has been held liable when his servant has made statements not for [★ 559] his employer, but in his own ★ interest." "There is, so far as I am aware," said Bowen, L. J., "no precedent in English law, unless it be *Swift* v. *Winterbotham* (*t*), a case that was over-

(*q*) 3 Ex. Div. 238.
(*r*) L. R., 2 Ex. 259.
(*s*) 18 Q. B. D. 714.
(*t*) L. R., 8 Q. B. 244.

ruled upon appeal (*u*), for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed not for the general or special benefit of the principal, but for the servant's or agent's own private ends."[1]

Purchase of shares induced by fraud of directors before company incorporated.]—It has been contended that *Western Bank of Scotland* v. *Addie* (*x*), decided in the House of Lords in the same year, is at variance with *Barwick* v. *English Joint Stock Bank* (*y*). The Western Bank of Scotland was established in 1832 as an unincorporated joint stock banking company. It collapsed on 9th November, 1857, with a deficiency of three million pounds sterling. On the 8th November, 1857, the concern was incorporated and registered for the purpose of a voluntary winding-up, and liquidators were appointed. The respondent (Addie) had fifteen shares, and was interested to the extent of a moiety of thirty other shares in the company from 1848. In November, 1855, he bought 135 additional shares at 76*l.* per share. He had to meet calls subsequently. In November, 1859, he commenced proceedings against the liquidators, to have the "contract or bargain of sale and purchase" of the 135 shares rescinded, on the ground that the purchase had been induced by false and fraudulent representations contained in the reports of the directors. The action was in effect against the shareholders. The creditors had been paid. At the trial it appeared that in June of each year meetings were held, when the directors submitted to the shareholders reports as to the state of the affairs of the bank for the year ending in the previous month of May. By the terms of the company's partnership deed, no partners, except the ordinary board of directors, were entitled to examine the books of the company. The reports submitted by the directors to the different meetings of the shareholders held from the years 1851 to 1855, both inclusive, represented the business of the bank as highly prosperous, and that its affairs were in a highly prosperous condition; and in the report for the year 1855 it was stated that, after providing for bad or doubtful ★ debts, the profits of the [★ 590] year available for dividend were upwards of 153,000*l.* These reports were untrue. The result brought out in the report for the year 1855 was obtained by taking as good assets of the bank the whole of the bad and irrecoverable debts. The reports were prepared by the manager, and, as the respondent alleged, were submitted to the shareholders for the fraudulent purpose of concealing from them the actual condition of the bank, and inducing the shareholders and others to purchase the shares. The respondent had

(*u*) Swift v. Jewsbury, L. R., 9 Q. B. 301.
(*x*) L. R., 1 H. L. Sc. 145.
(*y*) *Supra.*

[1] Nor at common law is a principal liable for a wilful tort of his agent, unless authorized by him or he subsequently ratified it. Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479.

received various dividends upon the 135 shares in question. The House of Lords, consisting of the Lord Chancellor, Lords Cranworth and Colonsay, decided against the respondent. The Lord Chancellor raised two questions: first, whether the respondent was entitled originally to rescind the contract for the purchase of the shares in question; and, secondly, whether he was debarred of his right by the change which had taken place in the condition of the company at the time when his action was brought. "The distinction," said his lordship, alluding to the first question, "to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against company." As to the second question, his lordship was of opinion that the respondent's case failed altogether.

Lord Cranworth said, "Assuming that this company (the first company) by its directors fraudulently induced the respondent to purchase 135 of these shares, so as to entitle him to relief against the company, he cannot insist on *restitutio in integrum*, unless he is in a condition to restore the shares which he so purchased. But this is impossible. The purchase was made by him in 1855, and [★ 561] in 1857 he was party to a proceeding whereby ★ the company from whom the purchase was made was put an end to. . . . . But although the respondent is excluded from redress in this form, it remains to consider whether he may not recover compensation in damages, and so obtain relief as beneficial as that from which he is thus barred. But here, too, I am of opinion that the respondent must fail. He comes too late. The appellants are not the persons who were guilty of the fraud; and although the incorporated company is, by the express provisions of the statute under which it was incorporated, made liable for the debts and obligations incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for the frauds or other wrongful acts committed by directors before the incorporation. An incorporated company cannot in its corporate character be called on to answer an action for deceit. But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent of which its funds have profited by those frauds." If this case is compared

with *Barwick* v. *English Joint Stock Bank* (*z*), it will be apparent that there is no variance in the decisions. The inconsistencies lie in some of the above dicta, for the decision turned really upon the fact that Addie brought his action against a company which had come into existence subsequently to the commission of the alleged fraud.[1]

The rule that the representations and knowledge of the agent are the knowledge and representations of the principal is true absolutely only in cases arising between the principal and third parties. When the agent has misled the principal by an untrue representation, then it is a solecism in reasoning to say that what was falsely represented by the agent to the principal must be taken to have been known to the principal to be false, because, in point of fact, it was false. Accordingly, where, upon a sale of cotton, a broker had acted for both the buyer and seller, and had falsely represented to the buyer that he had authority to sell, he was held liable for the misrepresentation in an action by the buyer (*a*).

Building Societies.]—The rule stated by Lord Hatherley in *Houldsworth* v. *City of Glasgow Bank* (*b*), is to the effect that a ★ corporation is bound as much as an individual by the [★ 562] wrongful acts of its agent, and that the result of misrepresentations by an agent must take effect in the same manner against a corporation as it would against an individual, applies only to the case of an agent acting within the scope of his authority (*c*). Neither the directors nor the secretary of an unincorporated building society are acting within the scope of their authority when they purport to borrow money on account of the society at a time when the society had not, to their knowledge, any power or authority whatever to accept a loan, the society not having received the benefit of the loan. If the society had received the benefit of the loan or of any part, it would be liable to that amount (*c*). In *Chapleo* v. *The Brunswick Building Society* (*d*), which was determined in 1881, and which was an action against the directors of the society to recover a loan obtained by the directors from the plaintiffs, it appeared that the limit of the borrowing powers prescribed by the rules of the society had been exceeded when the loan was made by the plaintiffs, and that the society had derived no benefit from the loan. The Court of Appeal held that the society was not liable, but that, notwithstanding the absence of fraud on the part of the directors, they were personally liable for the money advanced. Bramwell, L. J., doubted whether the case came within the authority of *Collen* v. *Wright* (*e*), and *Richardson* v. *Williamson* (*f*).

(*z*) *Supra.* (*a*) Hughes *v.* Graeme, 33 L. J., Q. B. 335. (*b*) 5 App. Ca. 317.
(*c*) Chaples *v.* Brunswick Building Society, 6 Q. B. D. 712, per Baggallay, L.J.
(*d*) *Ubi supra.* (*e*) 7 E. & B. 301. (*f*) L. R., 6 Q. B. 276.

[1] See Miller *v.* Wild Cat, &c., Road Co., 52 Ind. 1; Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. St. 69; Custar *v.* Titusville Gas & Water Co., 63 Pa. St. 385.

Circumstances which amount to fraud.]—With respect to the circumstances that will be held to amount to fraud, the remarks of Lord Cranworth in *Reynell* v. *Sprye* (*f*), which was decided in 1852, are well worthy of consideration. "It may be impossible," his lordship observed, "to give a definition of what constitutes fraud in the contemplation of a court of equity, so as to meet all the various combinations of circumstances to which the word may apply; but there can be no difficulty in saying that whenever anyone has, by wilful misrepresentation, induced another to part with his rights in the belief that such representations were true, this is, in the plainest and most obvious sense, a fraud.[1] Once make out that there has been anything like intentional deception, and no contract [★ 563] resting in any degree on that foundation can ★ stand. It is impossible so to analyze the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, it is impossible to say of any one such representations so made, that even if it had not been made the same resolution would have been taken or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of representations made to him, any one of which has been untrue and known to the party so to be, the whole contract is in equity considered as having been obtained fraudulently; nor is the case at all varied by the circumstance that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error" (*g*). In the case quoted a conveyance of a moiety of an estate was set aside, and a contract for the purchase of the other moiety was ordered to be delivered up to be cancelled, on the ground that both the conveyance and contract were obtained by fraud.

Representations must be made by agent in the course of his employment.]—In order to render the company liable for the agent's false representation, it is essential that the representation should be made in the course of the agent's employment.[2] *McGowen Company, Limited* v. *Dyer* (*h*), decided in 1878, is one of the most recent

(*f*) 21 L. J., Ch. 633.
(*g*) 21 L. J., Ch. 662, 663.
(*h*) L. R., 8 Q. B. 141.

[1] The representations which deserve the name of fraudulent are usually said to be representations which are false in themselves, not known to be true by the party making them, reasonably relied upon by the other party and furnishing a substantial inducement to his action. Bispham's Equity, § 206. One who makes a material misrepresentation, without knowledge of its truth or falsity, is guilty of fraud as much as if he knew it to be untrue. Bennett v. Judson, 21 N. Y. 238.

[2] Sunbury Fire Ins. Co. v. Humble, 100 Pa. St. 495; Erie City Iron Works v. Barber, 106 Pa. St. 125. Hannibal &c. R. R. v. Green, 68 Mo. 169.

cases in which this principle was affirmed. This was an action on a bill of exchange, drawn by the defendant on and accepted by D. & Co., a firm consisting of the defendant's son and two others, and indorsed by the defendant to the plaintiffs. At the trial before Blackburn, J., it was proved that the plaintiffs' company, of which C. was the managing director, had commenced printing for Dyer & Co. a periodical which was to be sold by S. & Co. on commission, and that C., as representing the plaintiffs, was to go on with the work without a guarantee. The defendant consented to become surety by drawing a bill on D. & Co. and indorsing it to the plaintiffs, upon the understanding that he was to have funds to meet it out of the debt accruing from S. & Co. to D. & Co. This arrangement was known to C. ★ Before the defendant drew this [★ 564] bill, C. had lent money to D. & Co. on his own account, and held their acceptance to his draft. When the latter bill became due, C. obtained an order on S. & Co. from the other two partners of D. & Co., without the knowledge of the defendant or his son, and under this order C. obtained the amount due from S. & Co. to D. & Co., and appropriated it to the payment of this bill. The court held that these facts afforded no defence to the action, inasmuch as the plaintiffs were not responsible for what the manager did in getting his private debt paid. "C. as managing director," said Mr. Justice Blackburn, who delivered the judgment of the court, "had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer should be answerable for the act of his agent not acting within the scope of his authority."

Liability of unincorporated society—Its directors.]—The Court of Appeal in *Chaples and wife* v. *The Brunswick, &c. Building Society* (*i*), which was decided in 1881, dealt with some complex questions with reference to the liability of a principal for the fraud of his agent. The action was for money lent. The society was unincorporated. By its rules the directors had a limited power to borrow money for the purposes of the society. The directors authorized certain advertisements which invited loans on behalf of the society. The loans were to be made through the treasurer, and it was represented that the loan should be on the terms that the directors should give their promissory note. The plaintiffs lent a sum of money to the society, paying it to the treasurer in the ordinary way. The society's borrowing power was exhausted at the time of the loan. The treasurer embezzled the money so lent, and the question was thus raised whether the society or the directors,

(*i*) L. R., 6 Q. B. Div. 696; 50 L. J. Q. B. 372; 44 L. T. 449.

or both, were liable to the plaintiffs. The jury had found at the [★ 565] trial that the treasurer had been held out, both by the ★ directors and by the society, as a person authorized to receive the money. Lord Coleridge held, on further consideration, that both were liable (*k*).

The Court of Appeal reversed that decision, so far as related to the society, on the ground that when people deal with those whom they know, or ought to know, to have a limited authority, they do so at their peril. As to the liability of the directors there was a difference of opinion amongst the Lords Justices. Bramwell, L. J., thought that the evidence only went to show that they allowed the treasurer to say he had authority to receive money as a loan to the society; but Baggallay and Brett, L. JJ., thought the case came within *Collen* v. *Wright* (*l*) and *Richardson* v. *Williamson* (*m*), his lordship did not dissent, and the judgment against the individual directors was affirmed.

Summary—Liability of principal for fraud of his agent.]—(1.). A principal is answerable when he has received a benefit from the fraud of his agent, acting within the scope of his authority (*n*).

In the whole series of cases from *Hern* v. *Nichols* (*o*) downwards, both elements which go to make up the principal's liability were present, *i. e.* (a) the fraud was committed by an agent in the course of his duty, and (b) it was committed for the benefit of his principal in the usual course of business (*p*).

(2.) As a general rule one agent is not responsible as a principal for the act of another agent, unless the former does something which makes him a principal in the fraud (*q*).

(3.) The tendency of the courts is not to extend the liability of a principal for fraud which he has not committed himself (*r*).

SECT. 3.—*Liability of Principal for Agent's Acts and Negligence.*

Acts must be within scope of employment.]—A principal master or employer is liable to third parties for results due to agent's acts [★ 566] and negligence when he is acting within the scope ★ of his authority;[1] but if the agent or servant is not acting within the

(*k*) 5 C. P. Div. 331. (*l*) 8 E. & B. 647. (*m*) L. R., 6 Q. B. 276.
(*n*) See Mackay *v.* Commercial Bank of New Brunswick, L. R., 5 P. C. at p. 410.
(*o*) 1 Salk. 289. (*p*) See *per cur.*, Weir *v.* Barnett, 3 Ex. Div. pp. 42–43.
(*q*) See per Fry, J., Cargill *v.* Bower, 47 L. J., Ch. 649; 38 L. T. 779; Weir *v.* Bell, 3 Ex. Div. 238.
(*r*) *Ib.*, per Bramwell, B., Swift *v.* Jewsbury, L. R., 10 Q. B. 301.

[1] Bruce *v.* Reed, 104 Pa. St. 408; Hill *v.* National Trust Co., 108 id. 1; Riley *v.* Ins. Co., 110 id. 144.
As where a man's servant in the ordinary course of business, obstructs the

scope of his employment the employer is not liable for his negligence.[1] Thus if a parcel is given to a waggoner for him to carry

public highway, principal will be liable for injury to third persons caused thereby; Harlow *v.* Humiston, 6 Cow. (N. Y.) 189. See also Simonton *v.* Loring, 68 Me. 164; Kennedy *v.* Ryall, 67 N. Y. 379; Giese *v.* Hall, 37 Hun. 440. The Rheola, 22 Blatchf. (C. C.) 124; Fuel *v.* Weston, 47 Vt. 634; Gass *v.* Coblins, 43 Mo. 377; Hays *v.* Miller, 77 Pa. St. 238; Siegrist *v.* Arnot, 10 Mo. App. 197; Montague *v.* Boston &c. R. R., 124 Mass. 242; Barber *v.* Britton, 26 Vt. 112; Petersburg *v.* Applegarth, 28 Gratt. (Va.) 321; Chicago & N. W. R. R. *v.* Bayfield, 37 Mich. 205. *Railroad Companies*—A railroad company is liable for injury resulting from the negligence of its agent in running cars over a public crossing. Georgia &c. Co., Wynn, 42 Ga. 331; N. Y., L. E. &c. R. R. *v.* Steinbrenner, 47 N. J. L. 161; for unlawfully ejecting a passenger from a car. Evansville &c. R. R. *v.* Baum, 26 Ind. 70; see Jackson *v.* Second Avenue El. R. Co., 47 N. Y. 274. For negligence of foreman in taking up rail for track repair, without giving a signal to approaching trains; Drynala *v.* Thompson, 26 Minn. 40; for injury resulting from a collision; New Orleans &c. R. Co. *v.* Allbritton, 38 Miss. 242; for not ringing bell or blowing whistle according to custom; Goodfellow *v.* Boston &c. R. Co., 106 Mass. 461; Schultz *v.* Chicago &c. R. Co., 44 Wis. 638. *Telegraph Companies*—Telegraph Companies are liable for the acts and negligences of their agents. As where an agent sent a different message from that addressed to him; N. Y. &c. Tel. Co. *v.* Dryburg, 35 Pa. St. 298. For goods or money lost by reason of mistake in sending message; De la Granger *v.* South Western Tel. Co., 25 La. Ann. 383; Squire *v.* West. Union Tel. Co., 98 Mass. 232. For refusal to transmit message, couched in decent language, an answer alleging such message to have been intended for an immoral purpose is insufficient; West Union Tel. Co. *v.* Ferguson, 57 Ind. 495; see also Bartlett *v.* West Union Tel. Co., 62 Me. 209; Tyler *v.* West. Union Tel. Co., 60 Ill. 440; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744.

In Bartlett *v.* West. Union Tel. Co., *supra*, it was held that a rule adopted by a telegraph company, that it will receive and send messages by night at half its usual rates "on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for the non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender" is against public policy; and, is, therefore, void, even when assented to by the sender.

[1] As where clerk in store borrowed money, and drew bills or notes for it in name of the firm; Kerns *v.* Piper, 4 Watts (Pa.), 222, where servant uses team of master for his own purposes and benefit, and in the absence of any directions from master, the master will not be liable even though he assented to the use of the team; Bard *v.* Yohn, 26 Pa. St. 482. A town is not liable for injury caused by the falling of a flag-staff, while being removed by the officers or employés of the town. The flag-staff not belonging to the town and it not being the duty of the town to remove it; Wakefield *v.* Newport, 60 N. H. 374.

A railroad company is not liable for injury received by a child in attempting to get upon one of the cars, in consequence of an invitation from one of its servant's in charge of the car; the invitation not being within the scope of the servants authority; Snyder *v.* Han. & St. Louis R. Co., 60 Mo. 413. A passenger upon a car desiring to alight, passed out upon the platform and requested the conductor to stop the car, and refused to get off until the car had come to a full stop; whereupon, and while the car was in motion, he threw him from the car with great violence and upon the pavement, whereby he was seriously injured. *Held*, that the act was a wilful and wanton trespass, not in performance of any duty to, or of any act authorized by the company, and that it was therefore not liable; Isaacs *v.* Third Ave. R. R., 47 N. Y. 122. Where one after purchasing a ticket as a passenger, applied to a servant of the company charged with the duty of checking baggage, to have his baggage checked to his place of des-

for his own gain, and not for the profit of his master, the master is not liable in case the parcel is lost (*q*). So where a van was standing at the door of A., from which A.'s goods were being unloaded, and A.'s gig was standing behind the van, B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off the box, and laid hold of the van horses' head; this caused the van to move, and thereby a packing-case fell out of the van upon the shafts of the gig, and broke them: it was held that B. was not liable for this (*r*). So if the damage is done by the servant while he is "out on a frolic of his own" (*s*). In *Joel* v. *Morrison*, Parke, B., directed the jury that "if the servants, being on their master's business, took a detour to call on a friend, the master will be responsible. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but, if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." In *Sleath* v. *Wilson* (*t*), Erskine, J., based the master's liability upon the ground that he had intrusted the servant with the control of the horse and cart, and so put it in the latter's power to mismanage them. In a subsequent case, the Court of Queen's Bench refused to adopt this ruling; and the true rule was stated to be that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant (*u*).

The cases which have arisen upon this subject, it has been said, have from the earliest time been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme

(*q*) Butler *v.* Basing 2 C. & P. 613. Note, too, that a husband's liability for the wrongful acts of his wife during coverture is not abolished by the M. W. P. Act, 1882; Peroka *v.* Kattenburg, 17 Q. B. D. 177.

(*r*) Lamb *v.* Palk, 9 C. & P. 629.

(*s*) Per Parke, B., Joel *v.* Morrison, 6 C. & P. 501.

(*t*) 19 C. & P. 607.

(*u*) Per Cockburn, C. J., Storey *v.* Ashton, L. R., 4 Q. B. 479.

tination, and by his importunate conduct and abusive language towards the servant provoked a quarrel, in which the servant to gratify his personal resentment, struck the plaintiff. *Held*, the company was not liable; Little Miami R. R. *v.* Wetmore, 19 Ohio St. 110. In absence of express evidence that a trespass was committed by the direction of the master, he will not be liable for wilful trespass by servant; McCoy *v.* McKowen, 26 Miss. 487. For other cases in which the principal was held not liable for acts of agent; see Chicago &c. R. R. *v.* Halleck, 13 Ill. App. 643; Marsh *v.* U. S. Car R. R., 56 Ga. 274; Comes *v.* Houghton, 102 Mass. 211; Yates *v.* Squires, 19 Iowa, 26; Aycrigg *v.* N. Y. & Erie R. R., 30 N. J. L. 460; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343; Douglass *v.* Stephens, 18 Mo. 362; Mali *v.* Lord, 39 N. Y. 381; Cousins *v.* Han. & St. Louis R. R., 66 Mo. 572; Hudson *v.* Missouri &c. R. R., 16 Kan. 470; Wilson *v.* Peverly, 2 N. H. 548; Campbell *v.* Providence, 9 R. I. 262; Porter *v.* Chicago &c. R. R., 41 Iowa 358.

difficulty to apply the law to the ever-varying ★ facts and [★ 567] circumstances which present themselves. There is, however, no doubt as to the true principle which ought to guide us. It was laid down in Lord Holt's time, and repeatedly since, that whenever the master intrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant so long as the latter is using it or dealing with it in the ordinary course of his employment (*x*). Hence the court held that a carman was not acting within the scope of his authority when, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, he took out his master's horse and cart and injured a cab (*y*). It is difficult to lay down an exact absolute line of demarcation between acts done within the scope of an authority and those beyond it. In one sense all wrongful or negligent acts are beyond the scope of the authority, but there are certain lines of deviation, and there are some things which may be so naturally expected to occur from the wrongful or neglegent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment (*z*).

Wilful and malicious acts.]—Again, a master is not answerable for the wilful and malicious act of his servant (*a*).[1] For instance, if a driver in a moment of passion vindictively strike a horse with his whip, that would not be an act done in the course of his employment (*b*). Distinguish *Ward* v. *London General Omnibus Co.* (*c*), where the court held that there was evidence for the jury that the act of a driver in striking at a rival driver was within the scope of his authority.

So it has been held that if a servant, driving a carriage in order to effect some purpose of his own, wantonly strike the horses of another person and produce an accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but unjudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless ★ conduct, for which [★ 568] the master will be liable, being an act done in pursuance of the servant's employment (*d*).[2]

(*x*) Rayner *v.* Mitchell, 2 C. P. Div. 360, per Lord Coleridge. (*y*) *Ibid.*
(*z*) Per Grove, J., in Bolinbroke *v.* Swindon Local Board, L. R., 9 C. P. 578.
(*a*) Macmanus *v.* Crickett, 1 East, 106.
(*b*) Per Williams, J., Limpus *v.* London General Omnibus Company, 1 H. & C. 531.
(*c*) 42 L. J., C. P. 265.
(*d*) *Per Curiam*, Croft *v.* Alison, 3 B. & Ald. 590.

[1] McKeon *v.* Citizens R. Co., 42 Mo. 79; Little Miami R. Co. *v.* Wetmore, 18 Ohio St. 110; Foster *v.* Essex Bank, 17 Mass. 479; Chicago &c. R. R. *v.* Bayfield, 37 Mich. 205; Cox *v.* Keahey, 36 Ala. 340.

[2] A railroad Company is liable for injuries resulting from the negligence, vio-

The general rule applicable to the liability of a principal or master to third parties for the acts of his servant or agent was referred to in the reports as early as the year 1697.

Damage from fire kindled by servant or by stranger.]—In *Turburville* v. *Stampe* (*e*), decided in that year, the plaintiff and defendant were owners of adjacent closes of heath. The action was for damage done by a fire negligently lighted on the defendant's field. The verdict having been found for the plaintiff, the defendant moved in arrest of judgment that the action ought not to be grounded upon the common custom of the realm. It was contended that the defendant's servant kindled the fire by way of husbandry, and a wind and tempest arose and drove it into his neighbour's field, so that it was not neglect in the defendant, but the act of God. This had not been proved at the trial, but the Court granted that it furnished a good defence. Lord Holt stated the law to be that a man ought to keep the fire in his field, and therefore the action lay. If a stranger sets fire to A.'s house, and it burns B.'s house, no action will lie against A., but if A.'s servant throws dirt into the highway, A. is indictable. So, if the defendant's servant in the present case kindled the fire "in the way of husbandry, and proper for his employment," though he had no express command, yet his master would be liable to an action for damage done to another by the fire (*f*). In *M'Kenzie* v. *M'Leod* (*g*), decided in the year 1834, the defendant's servant burnt down a house demised to the defendant, by lighting furze and straw, with a view to cleanse the chimney which smoked. Chief Justice Tindal directed the jury, that if they thought the act in consequence of which the accident had happened was done within the general scope of her duty, they should find a verdict for the plaintiff; otherwise for the defendant. A motion to set aside the verdict on the ground of misdirection was dismissed. "The words, 'the servant's duty,'" said Baron Alderson, "may convey several meanings. They may mean cases where the duty is defined by precise orders, or where something is directed to be done, [★ 569] and the manner of doing it is left wholly in the ★ discretion of the servant, or when the manner of doing it is only partly

(*e*) 1 Ld. Raym. 264.
(*f*) See Patten *v.* Rea, 2 C. B., N. S. 606.
(*g*) 10 Bing. 385.

lence, or carelessness of its conductors, in removing from its cars a passenger who refused to pay his fare or produce his ticket. Pennsylvania Railroad Co. *v.* Vandiner, 42 Pa. St. 365; Milwaukee &c. R. R. *v.* Finney, 10 Wis. 388; Hoffman *v.* N. Y. Cent. R. Co., 87 N. Y. 25; Clark *v.* N. Y., Lake Erie R. Co., 40 Hun. (N. Y.) 605; Perkins *v.* Missouri &c. R. Co., 55 Mo. 201; Healy *v.* City Passenger R. Co., 28 Ohio St. 23; Columbus &c. R. R. *v.* Powell, 40 Ind. 37. See, also, Howe *v.* Newmarch, 12 Allen (Mass.), 49; Holmes *v.* Wakefield, 12 Allen, 580; Ramsden *v.* Boston & Alb. R. R., 104 Mass. 117; Hoffman *v.* N. Y. Cent. R. R., 87 N. Y. 25; Smith *v.* Webster, 23 Mich. 298; Ochsenbein *v.* Shapley, 85 N. Y. 214; Spaulding *v.* Chicago &c. R. Co., 33 Wis. 582; Pittsburgh &c. R. Co. *v.* Kirk, 102 Ind. 399; N. W. R. Co. *v.* Hack, 66 Ill. 238; Ward *v.* Young, 42 Ark. 542.

left in his discretion. In the first case, the act of the servant is the act of the master, in the second, the judgment exercised may be considered the judgment of the master, and the master must be responsible. But where he has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice or common sense, the master can be held responsible." Where an agent does an act which his principal had no power himself to do, there is a presumption that such act was not within the scope of the agent's employment. An authority to do such an act will not be implied (*h*).[1]

Negligence of carman—Deviation or new journey.]—In *Mitchell* v. *Crassweller* (*i*), decided in the year 1853, the defendants' carman having finished the business of the day returned to their shop, with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman to Euston square, and, on his way back, ran over and injured the plaintiff and his wife. The court held unanimously that the defendants were not liable. "If the master is liable where the servant has deviated," said Jervis, C. J, "it must be where the servant has originally started on his master's business. In other words, he must be in the employ of his master at the time of committing the grievance." This *dictum*, as will be seen, must be taken with some qualification. It was remarked by Cresswell, J., "if a servant in executing the order, expressed or implied, of his master, does it in a negligent, improper and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty, and a violation of the trust reposed in him." This decision was afterwards acted upon by the Queen's Bench (*k*). The defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles. On their return, when about a quarter of a mile from the defend-

(*h*) See Poulton *v.* London and South Western Railway Company, *infra.*
(*i*) 13 C. B. 723; 22 L. J., C. P. 100.
(*k*) Storey *v.* Ashton, L. R., 4 Q. B. 476.

[1] A railroad company is liable for the negligent act of its servant, a fireman or engineer, in throwing from the locomotive a burning stick of wood, which falls into dry grass and leaves near the track, and from which loss results to a third person. Spaulding *v.* Chicago &c. R. Co., 33 Wis. 582; McCown *v.* N. Y. Cent. &c. R. R., 66 Barb. 338.

Section-men were in the employment of a railroad company in repairing its track, when they quit work at noon to eat their dinner, they kindled a fire on the company's right of way, for the purpose of warming their coffee. After eating, they resumed work, negligently leaving the fire unextinguished, which subsequently spread and ran on the land of another and destroyed his property. Held that company was not liable. The men were not acting in the course of or within the scope of their employment in connection with the company's business. Moner *v.* St. Paul &c. R. R., 31 Min. 351; Oil Creek &c. R. R. *v.* Keighron, 74 Pa. St. 316.

ant's offices, the carman, instead of performing his duty and driving [★ 570] to the defendant's offices, was induced by the ★ clerk (it being after business hours) to drive in quite another direction on business of the clerk's, and while they were thus driving the plaintiff was run over, owing to the negligence of the carman. Upon argument, *Joel* v. *Morrison* (*l*), *Sleath* v. *Wilson* (*m*), and *Whatman* v. *Pearson* (*n*), were quoted in support of the proposition that until the master's business is finished the servant is acting in the master's employment, however much he may disobey the order of his master. The whole court, however, held that the servant was not simply returning by a roundabout way, but that he had started on an entirely new and unauthorized journey. Hence it was held that the defendant was not responsible.[1]

Runaway horse—Absence of driver.]—In *Whatman* v. *Pearson* (*o*), decided in the year previous to *Storey* v. *Ashton* (*p*), the defendant was employed as a contractor under a district board in carting away the soil excavated from the highway. For this purpose he employed a number of men with horses and carts. The men were allowed one hour for dinner, but they were not to go home to dine or to leave their horses and carts. Contrary to this regulation, one of the men went to dine at his home, a distance of about a quarter of a mile, and whilst so engaged left his horse and cart unattended before his door. The horse ran away and damaged the plaintiff's railings. Mr. Justice Byles left it to the jury to say whether at the time the accident happened the driver was acting within the scope of his authority. The jury found in the affirmative. Upon argument of a rule to enter a non-suit, the learned judge expressed a doubt whether he was correct in leaving the question to the jury. The court, however, held that the question was properly left (*q*).[2]

(*l*) *Supra.* (*m*) *Supra.* (*n*) L. R., 3 C. P. 422.
(*o*) *Supra.* (*p*) *Supra.*
(*q*) See Limpus v. London General Omnibus Company, 32 L. J., Ex. 34; 1 H. & C. 526; and Stone v. Cartwright, 6 T. R. at p. 412.

[1] The owner of an express wagon employed a servant to drive it, and intrusted it to him, generally, to be used at his discretion, in doing such business as he, the servant, could secure in the way of employment for the wagon; while thus employed, the servant, having delivered a trunk, on his return, got "a load of poles for himself," and, while taking them home negligently drove over and injured a child. The owner was held liable. Mulvehill v. Bates, 31 Minn. 364.

A coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking it to the stable, used it in going upon an errand of his own, without his master's knowledge or consent; while doing so he negligently ran into and injured the horse of another. Master held not liable. Sheridan v. Charlick, 4 Daly (N. Y.), 338; Cavanaugh v. Dinsmore, 12 Hun. (N. Y.) 465. A railroad company is not liable for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes and outside of the line of his employment. Cousins v. Han. & St. Louis R. R., 66 Mo. 572. See also Acrigg v. N. Y. & Erie R. R., 30 N. J. L. 460.

[2] A son 28 years of age while living with his father as a hired man on his

Liability for acts which principal himself had no power to do—Arrest of passenger—False imprisonment.]—In *Poulton* v. *London and South Western Rail. Co.* (*r*), a station-master had detained the plaintiff in custody for refusing to pay the return carriage of a horse. The court held, that inasmuch as a railway company has no power to arrest for non-payment of the carriage of goods, the defendants were not liable in an action for false imprisonment. A railway company has, however, power to arrest a ★ per- [★ 571] son who travels on their line without having paid his fare. Hence a railway company has been held liable for the act of their station-master and policeman in wrongfully arresting a man under a mistake, and for the benefit of the company (*s*). But the company will not be liable when the policeman's act was beyond the scope of his authority (*t*). So, if the conductor of an omnibus is authorized to remove a disorderly passenger, his employer will be liable if the conductor in removing a passenger whom he thought to be disorderly, used more violence than was necessary (*u*). Mr. Justice Mellor drew an analogy in *Poulton* v. *London & South Western Rail. Co.* between the distinction there acted upon and that which exists in case of actions against magistrates. If the station-master makes a mistake in performing an authorized act, the company will be liable; but if he acts in a manner in which the company would not be authorized to act, and under a mistake as to what the law is, then the rule is different. So if a migistrate acts within the scope of his authority, however erroneously he judges of the facts, he is protected; but the moment he assumes the jurisdiction over a matter which does not belong to him, an action lies. This analogy, however, will not bear a close examination, for the simple reason that an agent cannot always lay claim to exemption from liability on the ground that he was acting within the scope of his authority. *Moore* v. *The Metropolitan Rail. Co.* (*x*), decided in the year 1872, is distinguishable from *Poulton* v. *London and South Western Rail. Co.* (*y*), on the ground that the agent had power to arrest for

(*r*) L. R., 2 Q. B. 534.
(*s*) Goff *v.* Great Northern Railway Company, 30 L. J. Rep., Q. B. 148.
(*t*) Walker *v.* South Eastern Railway Company, Smith *v.* Same, L. R., 5 C. P. 640; 39 L. J., C. P. 346.
(*u*) Seymour *v.* Greenwood, 30 L. J., Ex. 328.
(*x*) L. R., 8 Q. B. 36.
(*y*) *Supra.*

farm, took his father's horse and drove to a railroad station to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. At the station the horse broke away from the post at which he was tied and ran into the team of another and injured him. *Held* the son and not the father was liable. Way *v.* Powers, 57 Vt. 135. If a team runs away from a servant while he is not in the employment of the master, the latter is not liable for damages. Stone *v.* Hills, 45 Conn. 44. If he is in such employment the master is liable. Schulte *v.* Halliday, 54 Mich. 73.

refusal to pay fares. The plaintiff was travelling with a return ticket from Moorgate Street to Notting Hill, and got out at Edgware Road. The ticket collector required payment of the fare, on the ground that the ticket was not available for distances short of that for which it was issued. Plaintiff refused to pay without a receipt being given. The inspector employed by the defendants then gave him into custody. The defendants were held to be liable for the official's conduct in omitting to exercise a sound discretion. This case falls within the principles laid down in *Goff* v. *Great Northern Rail. Co.* (*z*).

[★572] ★ *Statement of the law by the Queen's Bench—Authority of railway porter.*]—The Court of Common Pleas, in the case of *Bayley* v. *The Manchester, &c. Rail. Co.* (*a*), which was decided in the year 1872, formulated a principle which is consistent with that acted upon by the Court of Queen's Bench in *Goff* v. *Great Northern Rail. Co.*, and cases of that class. A person, it was said, who puts another in his place to do a class of acts in his absence, merely leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done; he is, therefore, answerable for the wrong of the person so intrusted; either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment. In that case the action was for injuries received by the plaintiff through the act of the defendants' porter, who violently pulled him out of a railway carriage, being under an impression that the plaintiff was in the wrong carriage. The porters were authorized to act under the orders of the clerks and others in charge. They were to exert themselves for the good order of the trains and stations, and to do all in their power to promote the comfort of the passengers and interests of the company. No passenger was to be allowed to enter any carriage without having paid his fare. Express power of removal was given only in two cases—when a passenger insisted on smoking or was intoxicated. "If the rules," said Willes, J., delivering the judgment of the court, "do not impliedly give such a power, which it seems they do, it is at least a question for the jury whether a porter, who is to turn his hand to anything, exercising upon a railway, in the supposed 'interests of the company,' the power of removing a passenger from the train, did so under a general authority to remove trespassers."[1] A rule to enter a nonsuit was discharged (*b*).

(*z*) *Supra*.
(*b*) Affirmed, L. R., 8 C. P. 148.
(*a*) L. R., 7 C. P. 415.

[1] A corporation owning a parlor car on a railroad, is not liable for an injury to a person, not a passenger, caused by the porter throwing from the car a bundle of his own clothing; which act was done solely for his own convenience. Walton *v.* N. Y. Cent. Sleeping Car Co., 139 Mass. 556.

Superintendent of station-yard]—The general superintendent of a station-yard has no authority to give a suspected thief in charge. In *Edwards* v. *London and North-Western Rail. Co.* (*c*), decided in 1870, by the Court of Common Pleas, the defendants' foreman porter, who had the general superintendence of ★ the [★573] station-yard in the absence of the station-master, was held to have no implied authority to give in charge a person whom he suspected to be stealing the company's property, though caught by the porter in the act. Mr. Justice Keating apparently thought that the liability of the employer for false imprisonment by the servant had not been carried further than when a company has made bye-laws, and an act of parliament has given authority to the company's servants to apprehend persons committing offences against the bye-laws. Mr. Justice Smith thought that as the cause of the arrest was not connected with the company's business, no general authority to apprehend persons supposed to be guilty of a felony could be presumed. A railway company is liable in an action for false imprisonment, if that imprisonment is brought about by the authority of the company; nor is it necessary that the authority should be under seal (*d*).[1]

Duty of company—Decision of question with third persons.]—The broad principal that it is the duty of a company, carrying on a business, to have upon the spot some one with authority to deal on behalf of the company with all cases arising in the course of their traffic, as the exigency of the case may demand, was for the first time definitely laid down by Jervis, C. J., in the year 1853, in *Giles* v. *The Taff Vale Rail. Co.* (*e*). In that case, the judges dealt only with the exigencies of traffic, or of the business of a carrier of goods, but the principal was extended by the Queen's Bench in 1861, and was said to be "applicable to all exigencies that may be naturally expected to rise in the ordinary course of any of the business of the company." "If," continued Blackburn, J., who delivered the judgment of the court, "these are of such a nature that a decision must be come to on behalf of the company promptly, the company may reasonably be expected to authorize some one on the spot to decide for them in such cases" (*f*). It is for the jury to say whether the person who assumed to act for the company was acting

(*c*) L. R., 5 C. P. 445.
(*d*) Eastern Counties Railway Company *v.* Broom, 20 L. J., Ex. 196.
(*e*) 23 L. J., Q. B. 43.
(*f*) Goff *v.* The Great Northern Railway Company, 30 L. J., Q. B. 148.

[1] A person having purchased a ticket for a passage upon a railroad before reaching his destination, lost it; and when he attempted to pass through the gate, from the station platform, was stopped by the gate-keeper and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss, and insisted in passing out. The gate-keeper called a police officer and had him arrested. The railroad company was held liable for false imprisoment. Lynch *v.* Metropolitan El. R. R., 90 N. Y. 77.

within the scope of his authority (*g*). When there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot, who is acting as if he had [★ 574] ★ express authority, is a *primâ facie* evidence that he had authority; and the presumption that he had authority must be rebutted by the company (*h*).

Acts done for prevention of felony, and acts done for punishment of offender distinguished—Booking clerks.]—An agent is acting within the scope of his authority whenever he does anything necessary for fulfilling the duty which he has to perform. It proceeds from this general principal, that if he is intrusted with property, he is invested with all authority necessary for its protection. Some difficult questions have arisen with reference to the existence of authority wherein agents intrusted with property had given into custody persons whom they suspected of having felonious designs upon such property. In *Allen* v. *The London and South Western Rail. Co.* (*i*), decided in the year 1870, a booking-clerk, in the service of the defendants, gave the plaintiff into custody on suspicion of having attempted to rob the till under his charge. This was done after the attempt had ceased. The duty of the clerk was to issue tickets to passengers, and to receive and take charge of the money. The jury found at the trial that he was acting in defence of the company's property. It was contended, against an application to enter a nonsuit, that whether the agent's act tended to prevent an attempt at felony, or to get back property after a felony, in either case he acts for the protection of the authorities. The full Court of Queen's Bench, however, consisting of Blackburn, Mellor, Lush and Hannen, was of a contrary opinion. "If a man in charge of a till," observed Blackburn, J., "were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away." His lordship would express no decided opinion upon these cases, as they were not raised in the present case, which he distinguished, on the ground that there is a marked distinction between an act done for the purpose of protect- [★ 575] ing the property by preventing a felony, ★ or of recovering the property back, and an act done for the purpose of punishing the offender for what has already been done, the latter act being not for the protection of the property, but for the vindication of

(*g*) *Ibid.*
(*h*) *Ibid.*, per Blackburn, J., Moore *v.* Metropolitan Railway Co., L. R., 8 Q. B. 39.
(*i*) L. R., 6 Q. B. 65.

justice. The agent here, as in the case put by Keating, J. (*k*), did something which was not in the ordinary course of his employment, but in pursuance of a duty which rests on everyone, though he was mistaken as to the facts on which he acted.

Wrongful arrest by agent.]—Commenting upon the reported decisions relating to the implied authority of agents to render principal liable for wrongful arrest, the Privy Council made some important observations in the case of *The Bank of New South Wales* v. *Owston* (*l*). "In none of the cases referred to," it was said, "did the question of the authority of a manager or agent intrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who, he had reason to believe, was attempting to steal or had actually stolen it.[1] . . . The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. . . . The arrest, and still less the prosecution of the offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervsion and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong ★ to him, at least [★ 576] in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors.

Stevedore and foreman—Negligence by latter before employment commenced.]—The case of *Burns* v. *Poulson* (*m*), decided in 1873, is not free from difficulty. In that case an action was brought

(*k*) Edwards *v.* London and North Western Railway Company, L. R., 5 C. P. 445.

(*l*) L. R., 4 H. L. 270; 48 L. J., P. C. 25; 40 L. T. 500. Those observations related to the authority of an acting bank manager to commence criminal proceedings.

(*m*) L. R., 8 C. P. 663.

[1] Where the superintendent and clerks called a policeman into the store of their employer, and directed him to arrest and examine the person of a lady suspected of stealing goods, which was done without the knowledge or the express or implied consent of the owner of the goods. Held the master was not liable. Mali *v.* Lord, 39 N. Y. 381.

against a stevedore for injuries caused by his foreman. The defendant contracted to ship iron rails, which he was to receive from a carrier for that purpose after they had been unloaded. He employed a foreman, whose duty it was to superintend the carriage of the rails to the ship after the carrier had unloaded them. The foreman, being dissatisfied with the way in which the carrier unloaded the rails, got into the cart, and threw out some of the rails so negligently that one struck and injured the plaintiff as he was passing by. At the trial the plaintiff was nonsuited. A rule *nisi* to enter the verdict for the plaintiff, on the ground that there was evidence for the jury that the defendant was acting within the scope of his employment was made absolute by Justices Grove and Denman, Mr. Justice Brett dissenting.[1] Mr. Justice Denman, in whose judgment Mr. Justice Grove coincided, relied on *Joel* v. *Morrison* (*n*), *Whatman* v. *Pearson* (*o*), and distinguished the case from *Storey* v. *Ashton* (*p*), and *Mitchell* v. *Crasweller* (*q*). "I think," said his lordship, "that the cases applicable to the subject establish that, even though in the ordinary course of his employment it would not be a part of the foreman's duty to assist in moving the rails from the cart, it was still a question for the jury, and not for the judge, whether in this particular case he was acting within the scope of his employment. . . . Can it be said that in the present case it would have been unreasonable for a jury to find that the act of the foreman . . . was an act *bonâ fide* and not unreasonably done in the zealous discharge of his duty to his master in the course of the business he was employed upon? And if they were of that opinion, might they not also properly find that he was acting within the scope of his authority?" It is not to be supposed that his lordship was of the opinion that the question is one of fact simply for the [★ 577] jury only, but the *ratio decidendi* adopted is ★ certainly open to the objection made by Mr. Justice Brett, who observed: "In this case the question is whether the time had arrived or the circumstances had arisen from doing anything which the servant was employed to do. Had his employment commenced? The question in all such cases is whether the servant was doing that which the master employed him to do" (*r*). "Where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant" (*s*). "It is not sufficient that the act should be done with intent to benefit or intent to serve the master. It must be something done in doing what the master has employed the ser-

(*n*) 6 C. & P. 501.
(*o*) L. R., 3 C. P. 422.
(*p*) L. R., 4 Q. B. 476.
(*q*) 13 C. B. 237; 22 L. J., C. P. 100.
(*r*) Per Mr. Justice Lush, in Storey *v.* Ashton, L. R., 4 Q. B. 480.
(*s*) Per Mr. Justice Maule, in Mitchell *v.* Crasweller, 22 L. J., C. P. 100.

[1] The Rheola, 22 Blatchf. (C.C.) 124; Zung *v.* Howland, 5 Daly (N. Y.), 136.

vant to do" (*t*). In *Whatman* v. *Pearson* (*u*) the servant was held to be acting in the course of his employment, because he was employed to manage the horse and cart during the day (*x*). This decision cannot be reconciled with the authorities.

Patteson, J., stated the rule to be that a master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one (*y*). By the court it was said, in *Croft* v. *Alison* (*z*), that if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horse of another person, and thereby produces an accident, the master is not liable; but if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's authority. Martin, B., directed the jury, in *Limpus* v. *London General Omnibus Company* (*a*), that where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the employment; but that if the true character of the act of the defendant's servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.

Cab owner and driver.]—A cab proprietor is liable for the acts ★ of the driver while the latter is acting within the scope [★ 578] of the purpose for which the cab is intrusted to him (*b*).[1]

Liability of ship owner for negligence of pilot.]—(1.) The owners are not liable for damage occasioned by the fault of the pilot acting in charge of the ship, within a district where the employment of a pilot is compulsory by law (*c*), unless contributory negligence on the part of the master or crew is proved (*d*).[2]

(*t*) Per Mr. Justice Blackburn, in Limpus *v.* London General Omnibus Company, 34 L. J., Ex. 34.
(*u*) *Supra.*
(*x*) Per Mr. Justice Byles.
(*y*) Lyons *v.* Martin, 8 A. & E. 515, 590.
(*z*) 4 B. & C. 590.
(*a*) 1 H. & C. 529.
(*b*) Venables *v.* Smith, 2 Q. B. Div. 279. See p. 9, *supra.*
(*c*) The Princeton, 3 P. D. 90; The Calabar, 2 P. C. 238; Clyde Navigation Co. *v.* Barclay, 1 App. Ca. 790. See p. 27, *supra.*
(*d*) *Ibid.*

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[1] Where A. hired his wagon, team and teamster to B., and during the bailment the team ran away and ran against C.'s horse, injuring him so that he died, held, that the teamster was the servant of the bailor and not of the bailee, and that the bailor, owning, furnishing and controlling the motive power was liable for the injury. Crockett *v.* Calvert, 8 Ind. 127. See Wood *v.* Cobb, 13 Allen (Mass.), 58.

[2] Smith *v.* Condry, 1 How. (U. S.) 28. Where the owner voluntarily employs a pilot he is liable. Shaw *v.* Reed, 9 W. & S. (Pa.) 72. Bussy *v.* Donaldson, 4 Dall. (Pa.) 206; Yates *v.* Brown, 8 Pick. (Mass.) 23; Quinn *v.* Power, 87 N. Y. 535; this latter case overruled the decision in Quinn *v.* Power, 17 Hun. 102.

(2.) The same rule applies in the case of a collision occasioned by a vessel while in tow of a steam tug having a licensed pilot on board (*e*).

As to his liability for the acts of the agents of owner, see *Coulthurst* v. *Sweet* (*f*).

Authority confined to a particular place.]—Where the authority of a servant or agent is confined to a particular place, an act done in another place will not be within the scope of his authority. Thus, where a servant, employed to impound sheep found upon his master's land, improperly impounded sheep found upon a highway out of his land, the court held that the master was not liable for the servant's act (*g*); but the decision would have been different had the servant improperly impounded sheep found upon his master's land (*h*). Similarly an agent intrusted with authority to be exercised over a particular piece of land has no authority to commit a trespass on other land. In *Bolinbroke* v. *Swindon Local Board* (*i*), the court held that a trespass under such circumstances was a wilful act for which the principal could not be made liable. There the local board of Swindon had taken a sewage farm, and intrusted the sole management to an agent. The latter, intending to increase the fall of a drain which divided the plaintiff's land from that of the defendants, went on to the plaintiff's land to cut away some soil and underwood. The court based the non-liability of the defendants on the ground that the authorities merely show that the liability of the principal extends to all acts done by the agent in furtherance within the scope of the business with which he is in-[★ 579] trusted (*k*). ★ *Mackay* v. *Commercial Bank of New Brunswick* (*l*) was distinguished on the ground that there plenary power had been given not for the carrying out a purpose limited to a particular piece of ground, but to conduct the entire business of the principal.

Joint undertakers—Liability a question of fact.]—Where several parties enter upon one common undertaking, or one common purpose of acting together, the question whether each of them has authority, independently of any partnership, to bind the others to the extent of attaining that common purpose, is a question of fact.

Commissioners.]—In *Horsley* v. *Bell* (*m*), decided in the year 1778, by Lord Chancellor Bathurst and Justices Gould and Ashurst, an act of parliament had been passed to make a certain brook navigable, the defendant and others being named commissioners to

(*e*) The Ocean Wave, 3 P. C. 205.
(*f*) 1 C. P. 649.
(*g*) Lyons *v.* Martin, 8 Ad. & E. 512.
(*h*) Bayley *v.* Manchester, &c. Railway Company, L. R., 7 C. P. 420.
(*i*) L. R., 9 C. P. 575.
(*k*) See Barwick *v.* English Joint Stock Bank, L. R., 2 Ex. 259; Poulton *v.* South Western Railway Company, L. R., 2 Q. B. 534; Bayley *v.* Manchester, &c. Railway Company, L. R., 7 C. P. 415; 8 *ib.* 148.
(*l*) L. R., 5 P. C. 394.
(*m*) Amb. 770; 1 Bro. C. C. 101.

carry the act into execution, by which tolls were to be taken and loans to be raised. A treasurer and surveyor were appointed, and the work was commenced. The defendants were all acting commissioners, by whom the plaintiff was employed to do certain work in prosecution of the scheme, and to whom they gave orders from time to time. The defendants did not join in all the orders, but every one of them joined in making some one of the orders. It was held that all the commissioners were liable upon each contract so made, the different contracts being only parts of one common plan. So harbour commissioners may be liable for the negligence of the harbour master (*n*).[1]

Contributory negligence.]—As to the effect of a plaintiff's contributory negligence upon his right of action, reference may be made to the following cases:—*Bridge* v. *Grand Junction Railway Company* (*o*), *Tuff* v. *Warman* (*p*), *Davies* v. *Mann* (*q*), *Walton* v. *The London and Brighton Railway Company* (*r*), *Davey* v. *London and South Western Railway Company* (*s*), *Wright* v. *Midland Railway Company* (*t*), *Brown* v. *Great Western Railway Company* (*u*), *The Bernina* (*v*), following *Thorogood* v. ★ *Bryan* (*x*), [★ 580] *M'Evoy* v. *Waterford Steamship Co.* (*y*), *The Vera Cruz* (*z*).[2]

Public corporations created by statute—Liability.]—The Court of Common Pleas decided, in *Holliday* v. *St. Leonards, Shoreditch* (*a*), that there is an exception from the general law making a master liable for the negligence of the servant when the servant is employed by a public body. This is no longer law (*b*). Where such a body is constituted by statute, having the right to levy tolls for their own profit, in consideration of their making and maintaining a dock or a canal, there is now no doubt of their liability to

(*n*) The Rhosina, 10 P. Div. 131; 54 L. J., P. 72.
(*o*) 3 M. & W. 244.
(*p*) 27 L. J., C. P. 322.
(*q*) 10 M. & W. 546.
(*r*) 1 Har. & R. 421.
(*s*) 12 Q. B. D. 70.
(*t*) 51 L. T. 539.
(*u*) 52 L. T. 622.
(*v*) 11 P. D. 31; 55 L. J., P. 21.
(*x*) 8 C. B. 115.
(*y*) 18 L. R., Ir. 159.
(*z*) 9 P. Div. 96. See Wakelin *v.* London and South Western Railway Company, 12 App. Ca. 41; Dublin W. and W. Railway Company *v.* Slattery, 3 App. Ca. 1155.
(*a*) 11 C. B., N. S. 192.
(*b*) See Mersey Docks, &c. *v.* Gibbs, 35 L. J., Ex. 225.

[1] Montague *v.* Boston & Alb. R. R., 124 Mass. 242.

[2] Oil City Gas Co. *v.* Robinson, 99 Pa. St. 1; Catawissa R. R. *v.* Armstrong, 49 Pa. St. 186; Arctic Fire Ins. Co. *v.* Austin, 69 N. Y. 470; Grippen *v.* N. Y. Cent. R. R., 40 N. Y. 34; Neil *v.* Gillett, 23 Conn. 437; Maurnus *v.* Champion, 40 Cal. 121; Jersey Ex. Co. *v.* Nichols, 33 N. J. L. 434; Cunningham *v.* Tyness, 22 Wis. 245; Ruter *v.* Foy, 46 Iowa, 132; Griggs *v.* Fleckenstein, 14 Minn. 81; Paulmier *v.* Erie R. R., 34 N. J. L. 151.

make good to the persons using it any damage occasioned by their neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Exchequer Chamber in the case of *Parnaby* v. *The Lancaster Canal Co.* (*c*). The ground on which the Court of Error rested their decision in that case is stated by Chief Justice Tindal to have been, that the company made the canal for their profit, and opened it to the public upon the payment of tolls. The House of Lords subsequently decided, in the year 1866, that the fact that the body does not collect the tolls for its own profit, but as a trustee for the benefit of the public, is immaterial (*d*). The case last cited also supports the proposition that, in the absence of anything in the statutes which create such corporations showing a contrary intention, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. In every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created (*e*). If the true interpretation of the statute is that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care and use reasonable skill that the works are such as the statute authorizes, or to take [★ 581] ★ reasonable care that they are in a fit state for the use of the public, those injured by the neglect of the statutable body may maintain an action against that body and be indemnified out of the funds vested in it by parliament.

Local Board—Improvement Commissioners.]—Thus the Court of Queen's Bench, in *Ward* v. *Lee* (*f*), and the Court of Common Pleas, in *Clothier* v. *Webster* (*g*), have expressed an opinion that an action lay against a local board of health, in its corporate capacity, for an injury sustained for making improper works. This point was expressly decided in *The Southampton and Itchin Bridge* v. *The Southampton Local Board of Health* (*h*), and this decision was followed and approved of by the Court of Exchequer in *Ruck* v. *Williams* (*i*), where it was held that an action would lie against improvement commissioners (sued by their clerk) for the improper mode in which they caused a sewer to be made.

Trustees of turnpike.]—In *Whitehouse* v. *Fellowes* (*k*), the Court of Common Pleas decided that an action lay against the trustees of a turnpike road (sued in their *quasi*-corporate capacity by their

(*c*) 11 Ad. & E. 223.
(*d*) The Mersey Docks and Harbour Board *v.* Penhollow, 35 L. J., Ex. 225.
(*e*) Mersey Docks and Harbour Board *v.* Gibbs, 35 L. J., Ex. 225.
(*f*) 7 Ell. & B. 426.
(*g*) 2 C. B., N. S. 798.
(*h*) 28 L. J., Q. B. 41.
(*i*) 3 H. & N. 308.
(*k*) 10 C. B., N. S. 765.

clerk) for negligence in the manner in which they had caused drains to be made. This decision, though consistent with all that was decided by the House of Lords in *Duncan* v. *Findlater* (*l*), is directly opposed to the opinion of Lord Cottenham.

Metropolitan Board of Works.]—In *Brownlow* v. *The Metropolitan Board* (*m*) it was decided that an action lay against the Metropolian Board for the injury sustained by a shipowner through the improper construction of a sewer in the bed of the Thames.

Exemption of property of commissioners from liability.]—For many years it has been the practice of the legislature to exempt the private means of commissioners from liability, either by incorporating them or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. "I can well understand," said Bramwell, B., in *Ruck* v. *Williams* (*n*), "if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying against the consequences of a slip, it is reasonable to hold that he should not be responsible ★ for it. I can also understand that [★582] if one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but when commissioners who are a *quasi*-corporate body are not affected (*i.e.*, personally) by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of damages, on what principle is it that if an individual member of the public suffers from an act *bonâ fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law" Chief Justice Best pointed out in *Hall* v. *Smith* (*i*) that it is harsh and impolitic to cast on individuals gratuitously a public duty, and make them responsible out of their private means for the nonfulfilment of it. But for many years it has been the practice of the legislature to exempt the private means of commissioners from liability. The basis of the above reasoning therefore fails, and *debile fundamentum fallit opus* (*k*).

Actions against local board.]—The liability of a local board of health for the negligence of their servants was discussed in 1871 in *Foreman* v. *Mayor of Canterbury* (*l*). The defendants' servants being employed to do a certain work upon the roads within their district left a heap of stones in one of them without any light or caution being affixed, and the plaintiffs upon a dark night drove against the heap and were injured. The court held that the defendants were liable for the injury.

In a considered judgment, Blackburn, J., agreed that the defend-

(*l*) 6 Cl. & Fin. 894.
(*m*) 13 C. B., N. S. 768; *ib* 546.
(*n*) 3 H. & N. 308.
(*i*) 2 Bing. 156.
(*k*) Per Blackburn, J., in Mersey Docks, &c. *v.* Gibbs, *supra*.
(*l*) L. R., 6 Q. B. 214; 40 L. J., Q. B. 138.

ants were not liable simply because they were surveyors of highways. On the other hand, the Public Health Act, 1848, which made them surveyors of highways, contains nothing to relieve them of liability merely because they were surveyors. "The local board of health," said his lordship (*m*), "if they were masters of the persons who were guilty of negligence, would be responsible for their acts, and they are not relieved from that responsibility merely because they are either surveyors or a local board. There was one case (*n*) in which the Court of Common Pleas decided that a body like the local board of health, who were made surveyors of highways, were not responsible for those who were their servants [★ 583] . . . . We ★ consider it to have been overruled by the decision of the House of Lords in the case of *The Mersey Docks* v. *Gibbs* (*o*) . . . because it was decided that a public body like the local board of health are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose."

Agent's mistake.]—A principal is liable to third persons for the mistake of his agent acting within the scope of his authority (*p*).[1]

SECT. 4.—*Liability where Damage caused by Act of Stranger.*

Lastly, it is not in all cases necessary to establish the relation of principal and agent in order to make a person liable for the act of another. For instance, where a person unlawfully placed a dangerous instrument in the road, the court held that he was liable in respect of injuries caused to another person who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriage-way, where the defendant had placed it (*q*).

Acts of trespasser.]—A person is not liable for the negligent act of a trespasser on his premises (*r*).

(*m*) L. R.,6 Q. B., p. 217.
(*n*) Holliday *v.* St. Leonards, 11 C. B., N. S. 192; 30 L. J., C. P. 361.
(*o*) L. R., 1 H. L. 111.
(*p*) Seymour *v.* Greenwood, 6 H. & N. 359; 7 H. & N. 355; Alvanley *v.* Kinnaird, 2 M. & G. 1; M'Kenzie *v.* Hesketh, 38 L. T. 171.
(*q*) Clarke *v.* Chambers, 3 Q. B. Div. 327.
(*r*) Stevens *v.* Woodward, 6 Q. B. D. 318; 50 L. J., C. P. 231.

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[1] As where A. the owner of some boards, which were piled in the yard of a saw mill, directed his servant to get them. The servant was first to obtain directions from the sawyer as to which boards belonged to A. Following such instructions, by mistake, he took boards which were owned by B. *Held* A. was liable for such mistake. May *v.* Bliss, 22 Vt. 477.

SECT. 5.—*Inevitable Necessity*—Vis major—*Act of God.*

Percolation of water through upper mine—vis major.]—In considering whether a principal is liable for the alleged negligence of his agent or servant, it may be important to consider whether the damage for which it is alleged the principal is responsible was due to the agent's default or negligence, or whether it was not rather due to an inevitable and irresistible necessity. The principles applicable to this branch of law pervade the whole law of torts. Thus, in *Smith* v. *Kenrick* (*s*), the owner of a coal mine on the higher level worked out the whole ★ of his coal, leaving no barrier between his [★ 584] mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. The court held that the plaintiff had no cause of action, inasmuch as the water was only left to flow in its natural course.[1] So, in the well-known case of *Fletcher* v. *Rylands* (*t*), Mr. Justice Blackburn observed, "We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief, and it escapes, must keep it at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God." This view was quoted with approval by Lord Cairns and Lord Cranworth in the House of Lords (*u*). The question here hinted at was actually raised in 1875 (*v*). The defendant, who had used all reasonable care, was held not to be liable for the results due to *vis major*, which caused a quantity of water stored in pools on his land to overflow and damage the plaintiff's property.[2] It is observed by Bram-

(*s*) 7 C. B. 564.
(*t*) L. R. 1 Ex. 265; *ib.* 3 H. L. 330.
(*u*) *Ib.*, 3 H. L. 339.
(*v*) Nichols *v.* Marsland, L. R., 10 Ex. 255.

[1] *Floods.*—If an injury be occasioned by an act of Providence, which was not anticipated and which could not have been foreseen, as in case of an unprecedented flood, the defendant will not be liable. Lehigh Bridge Co. *v.* Lehigh Coal &c. Co., 4 Rawle (Pa.), 9; Bell *v.* McClintock, 9 Watts (Pa.), 119; Gillespie *v.* St. Louis &c. R. Co., 6 Mo. App. 534; International &c. R. Co. *v.* Halloran, 53 Texas, 46; China *v.* Southwick, 121 Me. 238.

Public Enemy.—Carriers of passengers are not liable for an act of God or of the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction. A railroad bridge having been burned down by the public enemy, the company were held not liable for injuries occasioned by the cars being thrown into the chasm. Sawyer *v.* Hannibal &c. R. Co., 37 Mo. 240.

[2] Everett *v.* Hydraulic Flume Co., 23 Cal. 225; Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177. See Norris Canal Co. *v.* Ryerson, 27 N. J. L. 457. Where one has been injured by the falling of snow and ice from the roof of a house, it is a question for the jury whether any want of due care on the part of the owner caused the injury. Garland *v.* Towne, 55 N. H. 57. The owner of a steam boiler, in the absence of negligence, is not liable for damages done by its bursting. Marshall *v.* Welwood, 38 N. J. L. 339.

well, B., who delivered the judgment of the court, "I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control. . . . I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."

"*Act of God*" *defined.*]—The first judicial exposition of the meaning of the expression "act of God," so far, at least, as regards the degree of care to be applied by a carrier in order to entitle him to the benefit of its protection, was given in 1875 (*x*). Brett, J., defined it to be such a direct, violent, sudden, and irresistible act of nature as could not, by any amount of ability, have been foreseen, or, if foreseen, could not by any amount of human care and skill [★ 585] have been resisted. Cockburn, C. J., ★ thought this rule too wide, and submitted as an intelligible rule that all that can be required of the carrier is that he should do all that is reasonably and practically possible to insure the safety of the goods. "If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that is reasonably required of him, and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major*, as by the act of God. I do not think that because some one may have discovered some more effectual method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject, something more efficient might not be produced, that the carrier can be made liable."[1]

Old authorities contain dicta *at variance with law.*]—It is a settled proposition of law that a principal or master is not liable for damage caused to third persons by his agent or servant in the absence of proof of negligence, that is, want of care or want of skill, on the part of the latter. If the injury is due to *vis major*, there being no default in the agent, neither the principal nor the agent is liable. There certainly are *dicta* to the contrary. In a case decided in 1803, one learned judge (*y*) summed up the authorities in

(*x*) Nugent *v.* Smith, 2 C. P. Div. 19; in error, 423.
(*y*) Grose, J., in Leame *v.* Bray, 3 East, 600.

[1] In Hays *v.* Kennedy, 41 Pa. St., the phrases "Act of God," "Inevitable accident," "Unavoidable dangers of the river navigation," are discussed and distinguished. Also, in Merritt *v.* Earle, 29 N. Y. 115, where it is said that the expressions "Act of God" and "Inevitable accident" have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an "Inevitable accident," which no foresight or precaution of man could prevent, but the phrase "Act of God" denotes natural accidents that could not happen by the invention of man, as storms, lightning, and tempest. The expression excludes all human agency.

the following words: "Looking into all the cases from the Year Book in the 21 Hen. VII., down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable to trespass." This view also appears to have been that of Lord Ellenborough (*z*). In a case decided in the year 1842 (*a*), Tindal, C. J., observed. "The inquiry is not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention of the party is quite unnecessary. That was decided in *Leame* v. *Bray*" (*b*). This touches merely upon a question of intention, and not upon that of negligence. *M'Laughlin* v. *Pryor* (*b*) is certainly no authority for the proposition laid down by Grose, J. In that case a party, consisting ★ of the defendant and others, hired for a day's [★ 586] excursion a carriage and post horses, driven by postillions, who were the servants of the owner of the horses. The defendant rode upon the box. The postillions, in endeavoring to force their way into a line of carriages, overturned a gig, and seriously injured the party who was in the gig. The defendant directly interfered in the conduct of the horses. Tindal, C. J., directed the jury that in order to find for the plaintiff they must be satisfied that the accident arose from the carriage driving against the gig. No question respecting want of care or skill arose. The whole argument related to the form of action.

Necessity of proof of negligence.]—On the other hand, the authorities clearly show that there must be evidence of negligence. Thus, in an old case, decided in the year 1796 (*c*), the action was for trespass, assault, and battery. To this the defendant pleaded that he rode upon a horse in the king's highway, and that his horse, being affrighted, ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff, against the will of the defendant. The plaintiff demurred. It was argued for the defendant that if the defendant showed that the accident was inevitable, and that the negligence of the defendant did not cause it, he was entitled to judgment. The court, however, held that, inasmuch as the justification might be given in evidence, judgment should be entered for the plaintiff. He should have pleaded the general issue, for if the horse ran away against his will, he would have been found not guilty. So in an earlier case, the action being similar (*d*), the defendant pleaded that he, amongst

(*z*) *Ibid.*
(*a*) M'Laughlin *v.* Pryor, 4 M. & G. 48.
(*b*) *Supra.*
(*c*) Gibbons *v.* Pepper, 4 Mod. 405.
(*d*) Weaver *v.* Ward, Hob. 134.

others, was a trained soldier in London, as was the plaintiff, and that they were skirmishing with their muskets charged with powder for their exercise against another captain and his band; and as they were so skirmishing, the defendant, *casualiter* and *per infortuniam* and *contra voluntatem suam*, in discharging his piece, did wound the plaintiff. Upon demurrer, judgment was given for the plain- [★ 587] tiff; for though it was agreed that if men tilted or ★ tourneyed in the presence of the king, or if two masters of defence playing their prizes killed one another, this was no felony, yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, no man should be excused of a trespass unless it is entirely without his fault, as, for example, if a man by force take A.'s hand and strike B., or if in the present case the defendant had said that the plaintiff ran before his piece, or if he had set forth the case with the circumstances, so that it appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.[1]

Dictum *of Grose, J., disregarded.*]—In *Wakeman* v. *Robinson* (*e*), decided in 1823, the jury were directed that if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. The Court of Common Pleas, however, disregarding the *dictum* of Grose, J., held, "that if the injury was occasioned entirely without default on the part of the defendant, or blame imputable to him, the action would not lie," and refused a new trial, because the evidence showed that the accident was caused by the defendant's default. The report of the case of *Underwood* v. *Hewson* (*f*) is altogether too meagre to be of any use as an authority.

Mischief happening through no want of reasonable care.][2]—In *Holmes* v. *Mather* (*g*), decided in the year 1875, which was an ac-

(*e*) 1 Bing. 213.
(*f*) 1 Str. 596.
(*g*) L. R., 10 Ex. 261.

[1] If there be negligence on the part of the defendant a plea of "inevitable accident" will not relieve him from damages caused by the accident. Hey *v.* Philadelphia, 81 Pa. St. 44; Township *v.* Merkhoffer, 71 Pa. St. 276; West. Union Tel. Co. *v.* Quinn, 56 Ill. 319; Bigelow *v.* Reed, 51 Me. 325; Baldwin *v.* Greenswood Turnpike Co., 40 Conn. 238; Hull *v.* Kansas City, 54 Mo. 598; Aurora *v.* Pulfer, 56 Ill. 270; Morse *v.* Richmond, 41 Vt. 435; Macauley *v.* New York, 67 N. Y. 602; Thomas *v.* Hook, 4 Philadelphia Rep. 119. See in particular The Clarita, 23 Wall. (U. S.) 1.

[2] Where there is an inevitable accident but no negligence, the defendant will not be liable. Searles *v.* Manhattan R. Co., 101 N. Y. 661; Ohio, &c., R. Co. *v.* Lackey, 78 Ill. 55; Parrot *v.* Wells (The nitro glycerine case), 15 Wall, (U.S.) 524; Brown *v.* Collins, 53 N. H. 442; Atchinson *v.* Dullam, 16 Ill. App. 42; Morris *v.* Platt, 32 Conn. 75; Shawhan *v.* Clark, 24 La. Ann. 390; Sullivan *v.* Scripture, 3 Allen (Mass.), 564; Moebus *v.* Becker, 46 N. J. L. 41; Paxton *v.* Berger, 67 Ill. 132; Bradley *v.* Andrews, 51 Vt 530; Lincoln Coal, &c., Co. *v.* McNally, 15 Ill. App. 181; Lawler *v.* Baring Broom Co., 56 Me. 443; Calkins *v.* Barger, 44 Barb. (N. Y.) 424; Boland *v.* Missouri R. Co., 36 Mo. 484; Bizzell *v.* Booker, 16 Ark. 308; Bennett *v.* Ford, 47 Ind. 264.

tion for negligently driving a carriage, whereby the plaintiffs were injured, the jury stopped the case, and expressed an opinion that there was no negligence in anyone. The verdict was entered for the defendant. There was proof of damage, but it was caused under the following circumstances:—The defendant's horses were being driven by his groom in the public highway, where they were startled by a dog barking, and became unmanageable. The groom requested the defendant not to interfere: the latter accordingly left the management to the groom, who could to some extent guide the horses. In trying to guide them round a corner, the carriage was dashed against some palisades, and one of the plaintiffs was struck down by the horses. The plaintiffs obtained a rule *nisi* to enter the verdict for them on a count for trespass. The rule was discharged ★ by the court, consisting of Barons Bramwell [★ 588] and Cleasby, The former, assuming that the defendant was as much liable as if he had been driving, thought the action was not maintainable, because the driver was absolutely free from all blame, and had endeavored to do what was best under the circumstances. "If the plaintiff," said his lordship, "under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye, and so injured it. It seems manifest that under such circumstances she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people, as they go along the road, must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." Baron Cleasby apparently based his judgment upon the ground that the act of the servant was not, under the circumstances, the act of the master, and he relied upon an observation of Baron Parke (*h*), to the effect that "in all cases where a master gives the direction and control over a carriage, or animal or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more." In an action for negligence, then, negligence must be proved. In *Pearson* v. *Cox* (*i*), decided in 1877, the defendants were builders and contractors, who, after the outside of a house was finished, had removed the outer hoarding, and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor shook a plank, which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff, who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. The court held that the defendants were entitled to judgment, as there was no negligence.

When an injury is occasioned to anyone by the negligence of

(*h*) Sharrod *v.* The London and North Western Railway Company, 4 Ex. 586.
(*i*) 2 C. P. Div. 369.

another, if the person injured seeks to charge with its consequences any other person than him who actually caused the damage, it lies [★589] on the person injured to show that the circumstances ★were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim "*Respondeat superior*" prevails, and the master is responsible. Thus, if a servant, driving his master's carriage along the highway, carelessly runs over a bystander, or if a gamekeeper, employed to kill game, carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman, employed by a builder in building a house, negligently throws a stone or brick from a scaffold, and so hurt a passer-by, in all these cases the person injured has a right to treat the wrongful or careless act as the act of the master. "*Qui facit per alium, facit per se*" (*k*).

Sect. 6.—*For an Agent's Illegal Acts.*

The trustees of a club are not liable for the act of the steward in selling liquor to non-members, contrary to the orders of the trustees and without their knowledge (*l*).

A master may be liable for the illegal act of his servant in concealing smuggled goods (*m*). A guardian of the poor may incur penalties for the act of his partner in supplying goods to be given in parochial relief (*n*). An innkeeper may be convicted for the act of his servant knowingly supplying liquor to a constable on duty (*o*), and even though neither master nor servant knew that the constable was on duty (*p*). The main question in these cases was whether the agent acted within his authority.

As to the general rule, see p. 577, *supra*.

[★ 590] ★ Sect. 7.—*The effect of intrusting performance of Work to a Contractor.*

Employment of independent contractor.]—The general rule, it has been said, is well established, that if the person on whose be-

(*k*) Per Lord Cranworth, Bartonshill Coal Company *v.* Reid, 3 Macq. 282.
(*l*) Newman *v.* Jones, 17 Q. B. Div. 132.
(*m*) Attorney-General *v.* Siddon, 1 Cr. & J. 220.
(*n*) Davies *v.* Harvey, L. R., 9 Q. B. 433.
(*o*) Mullins *v.* Collins, L. R., 9 Q. B. 433.
(*p*) Condy *v.* Le Cocq, 13 Q. B. Div. 207. But see Newman *v.* Jones, *supra*.

half a particular work is done intrusts the execution of the work to a person whose calling is to perform work of that kind, and who is master of the workmen employed, having control over them, he is not liable for injuries done to third persons from the negligent execution of the work (*p*).[1]

This rule is, however, subject to the following exceptions:—

(1.) Where the work which is intrusted to the independent control of another involves the performance of a duty which is incumbent upon the person by whom the work was so intrusted (*q*):[2]

(2.) Where a person is in possession of fixed property, which is so managed or dealt with that injury results to another, the former will not escape liability by reason of the fact that he has employed an independent and competent contractor (*r*):[3]

(3.) Where a person undertakes that due care has been exercised in the construction of a building or the like, and that it is reasonably fit for the purposes to which it is applied, he will be liable for injuries sustained owing to the negligent construction of the same, notwithstanding that he employed competent contractors to erect the same (*s*).

Principal liable if he has interfered in the work.]—As an illustration of the general rule, it may be observed that in *Burgess* v. *Gray* (*t*), which was decided in 1848, Tindal, C.J., ruled that if the jury

(*p*) Cuthbertson *v.* Parsons, 12 C. B. 304; Milligan *v.* Wedge, 12 Ad. & E. 737.

(*q*) Pickard *v.* Smith, and cases *infra*.

(*r*) See cases *infra*.

(*s*) Francis *v.* Cockrell, L. R., 5 Q. B. 501; 39 L. J., Q. B. 291; Grote *v.* Chester, &c., Railway Company, 2 Ex. 251; Sharp *v.* Gray, 9 Bing. 457; distinguish Redhead *v.* Midland Railway Company, 38 L. J., Q. B. 169; and Pike *v.* Polytechnic Institution, 1 F. & F. 712.

(*t*) 1 C. B. 578.

[1] Allen *v.* Willard, 57 Pa. St. 374; Erie *v.* Caulkins, 85 *id.* 247; Wray *v.* Evans, 80 *id.* 102; Harrison *v.* Collins, 86 *id.* 153; Smith *v.* Simmons, 103 *id.* 32; Deford *v.* State, 30 Md. 179; Eaton *v.* European, &c., R. Co., 59 Me. 520; Hexamer *v.* Webb, 101 N. Y. 377; Kepperly *v.* Ramsden, 83 Ill. 354; Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653; Martin *v.* Tribune Association, 30 Hun. (N. Y.) 391; Pierrepont *v.* Loveless, 72 N. Y. 211; Conners *v.* Hennessey, 112 Mass. 96; Harkins *v.* Standard Sugar Refinery, 122 *id.* 400; Fink *v.* Missouri Furnace Co., 82 Mo. 276; Cuff *v.* Newark, &c., R. Co., 35 N. J. L. 17; Dupratt *v.* Lick, 38 Cal. 691; Wood *v.* School District, 44 Iowa, 27. See Darnstaetter *v.* Moynahan, 27 Mich. 188.

[2] As where the owner of a store, part of which was occupied by a tenant, made a contract with a builder, for a specified sum, to put a new roof on the building, but did not, in such contract, bind the builder to use proper means to protect the property of the tenants from the weather while such repairs were being made. He was held liable for the negligence of the contractor in leaving the roof without covering, so that during a storm the rain came through and damaged the tenant's goods. Sulzbacher *v.* Dickio, 6 Daly (N. Y.) 469. *Post* 592, note 1.

[3] Lowell *v.* Boston, &c., R. Co., 23 Pick. (Mass.) 24; Stone *v.* Chesline R. Co., 19 N. H. 427; Carman *v.* Steubenville, &c., R. Co., 4 Ohio St. 399.

thought the defendant had completely parted with all control over the work to a contractor, the former could not be held responsible for damage caused by the contractor's negligence; but otherwise, if he had himself exercised any control. A., the contractor, was employed to make a drain into a common sewer by B., who owned and [★ 591] occupied premises adjoining the ★ highway. In performance of this work the workmen employed by A. placed gravel on the highway, in consequence of which C., in driving along the road, was injured. A. had the sole management of the work, and employed D. to cart away the rubbish, and had charged B. in his bill for the sum paid for carting away the rubbish. The only evidence of B.'s personal interference was that he had applied to the commissioners for leave to perform the work, and that before the accident the dangerous position of the heap was pointed out to him, and he promised to remove it. The jury found for the plaintiff, and the court held that there was evidence to support their finding.[1] Chief Justice Tindal was clear, however, that if this had been the simple case of a contract between A. and B., and there had been no personal interference on the part of B., the damage should be made good by the contractor, and not by his employer.

The above case, it will be seen, is no authority for any proposition at variance with the above exceptions. The *obiter dicta* of Tindal, C. J., were unnecessary to the decision; and if they did contain what was at one time the law, they have long ceased to do so (*u*).

Principal liable where he intrusts to another the performance of a duty.]—In *Pickard* v. *Smith* (*x*) the defendant employed a coal merchant to put coals into his cellar, and was held liable for injury suffered by the plaintiff from his falling through the cellar hole, which was left open by the negligence of the coal merchant's servants. The rule stated by the court was that if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. The rule is, however, not applicable to cases in which the act which occasioned the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment whereby an injury is occasioned.[2] In a subsequent case the coal merchant was held responsible under similar circumstances (*y*).

(*u*) See Bush v. Steinman, 1 B. & P. 404; Martin *v.* Temperly, 4 Q. B. 298, and cases of *infra*.

(*x*) 10 C. B., N. S. 470.

(*y*) Whiteley *v.* Pepper, 1 Q. B. Div. 271.

[1] Gilbert *v.* Beach, 16 N. Y. 606; Griffiths *v.* Wolfrann, 22 Minn. 185.

[2] Where a city street is rendered unsafe by an excavation thereon, made by a contractor in the performance of a contract with the city government, it is the duty of the city to see that such excavation is carefully guarded, and if an injury be caused thereby, it will be responsible. Bruss *v.* City of Buffalo, 90 N.

Negligent exercise of parliamentary power—Drain left open.]—★ *Gray* v. *Pullen* (*z*), a decision of the Exchequer Chamber, [★592] is a still stronger authority in support of the proposition that where a work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor.[1] An Act of Parliament authorized the cutting of a trench across a highway for the purpose of making a drain. Attached to the exercise of the right was the condition of filling up the trench after the drain had been completed. The defendant employed an independent contractor to do the whole work; owing to the negligence of the latter in filling up the trench, the plaintiff 's wife had sustained personal injury. The Court of Queen's Bench held that the contractor alone was liable; but this judgment was reversed in the Exchequer Chamber.

Liability of occupier through fall of lamp.]—In *Tarry* v. *Ashton* (*a*), decided in 1876, the defendant became the occupier of premises from which a lamp was suspended over the highway. This lamp was worn out before he became occupier. A man in the defendant's employ had raised a ladder against the bracket from which the lamp hung, and on mounting it, to save himself from falling, caught hold of the bracket, which gave way. The lamp in falling struck the plaintiff. A few months before the defendant employed an experienced gasfitter to examine the lamp and put it in thorough repair. The jury found there was no negligence on the part of the defendant or of the servant who mounted the ladder, but that there was on the part of the gasfitter. The court held that the defendant was liable. Mr. Justice Blackburn put this liability upon the ground that, as he knew of the defective state of the lamp he was bound to put it in good repair, and that he could not escape from liability by intrusting the fulfilment of the duty to

(*z*) 5 B. & S. 970; 34 L. J., Q. B. 265; and see Pitts v. Kingsbridge Highway Board, 19 W. R. 884; 25 L. T. 195.

(*a*) 1 Q. B., Div. 314.

Y. 679, even though it did not reserve or exercise any control or direction over the manner of doing the work, except to see that it was done according to specifications which were part of the contract. Circleville *v.* Neuding, 41 Ohio St. 465; Wilson *v.* Wheeling, 19 W. Va. 323. See also Darmstaetter *v.* Moynahan, 27 Mich. 188, and Allison *v.* Western &c. R. Co., 64 N. C. 382.

[1] A contractor agreed with the owners of a mine to do certain work therein, the owners engaging to furnish and put up such props or supports for the roof of the mine as would renders the miners secure, whenever notified by the contractor that the same were necessary.

If the owners had actual knowledge that such supports were necessary, they will be liable to any employé of the contractor for injuries received in the mine, even though the contractor did not notify them that they were necessary. It was the duty of the owners to keep the mine in a safe condition for those working in it. Kelly *v.* Howell, 41 Ohio St. 438; Lake Superior Iron Co. *v.* Errickson, 39 Mich. 492.

others. Justices Lush and Quain thought that if a person maintains such a lamp for his own purposes, it is his duty to maintain it so as not to be dangerous to passengers.

Negligence of contractor in rebuilding house.]—There is another class of cases which fall within the rule laid down by the Queen's [★593] ★ Bench in *Bower* v. *Peate* (*b*) in the year 1876. The rule is that, when work is committed to a contractor from which, if properly done, no injurious consequences can arise, the party authorizing the work is exempt from liability for injury resulting from negligence which he had no reason to anticipate; whereas if the work to be executed is such that mischievous consequences will arise unless preventive measures are adopted, the person authorizing the work is liable for injury caused by any neglect in not preventing such consequences, and it is quite immaterial through whose default the omission to take the necessary measures for their prevention arose.[1] In that case the defendant employed a contractor to pull down and rebuild his house, the latter undertaking the risk of supporting the house of the plaintiff, an adjoining occupier, and to make good any damage. Owing to a want of proper support the plaintiff's house was injured, and the court held that the action was properly brought against the defendant. It was contended, on behalf of the defendant, that he could not be responsible unless a nuisance was created (*c*), but without effect. From certain of the observations in the judgment it might be inferred that if the contractor had contracted specifically to give support to the plaintiff's house, such work being included in the specification the result of the case would have been different. The introduction, however, of such a stipulation, it is submitted, could not have the effect of limiting the rights of the plaintiff (*d*).

Bower v. *Peate* (*e*) was approved and followed by the House of Lords in *Dalton* v. *Angus*, which was determined in the year 1881. The action was brought by reason of the falling of the house of Angus & Co. (plaintiffs and respondents), through the excavation of the adjoining land of the commissioners, in the course of certain work executed for them by the appellant Dalton, under a contract, and for Dalton by sub-contractors. The commissioners disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The House of Lords held that if the plaintiffs were entitled to recover at all, they were entitled to recover against both the commissioners and Dalton. "Ever [★ 594] ★since *Quarman* v. *Burnett* (*f*)," said Lord Blackburn,

(*b*) 1 Q. B. Div. 321.
(*c*) See Hole *v.* Sittingbourne Railway Company, 30 L. J., Ex. 81; Ellis *v.* Sheffield Gas Company, 23 L. J., Q. B. 42.
(*d*) See Burgess *v.* Gray, 1 C. B. 578.
(*e*) 1 Q. B. D. 321.
(*f*) 6 M. & W. 499.

[1] Homan *v.* Stanley, 66 Pa. St. 464; Chicago *v.* Robbins, 4 Wall. (U. S.) 657; Gorham *v.* Gross, 125 Mass. 233.

"it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contracter to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it (*g*).[1] I do not think that either side disputed these principles, nor that in *Bower* v. *Peate* (*h*), the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house, which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler* v. *Hunter* (*i*) was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower* v. *Peate*, I think that the reasoning in *Bower* v. *Peate* is the more satisfactory of the two" (*j*).

The Lord Chancellor (Selborne) was equally emphatic in support of the proposition that the liability might be twofold. "The commissioners," said his Lordship, "disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The same point arose, under very similar circumstances, in *Bower* v. *Peate* (*k*), and was decided adversely to the contention of the appellants. It follows from that decision, as to the correctness of which I agree with both the Courts below, that if the plaintiffs are entitled to recover at all, they are entitled to recover against both the commissioners and Dalton" (*l*).

★In a subsequent case determined by the House of [★595] Lords in 1883 (*m*), a dictum of Cockburn, C. J., contained in *Bower* v. *Peate*, extending the doctrine of liability beyond that laid down in *Quarman* v. *Burnett*, was disapproved of. In the case cited the decision of the Court of Appeal was affirmed, and the House of Lords held that the law casts a duty upon one of the joint owners of a party wall to see that reasonable care and skill were exercised

(*g*) Hole *v.* Sittingbourne Railway Company, 6 H. & N. 488; Pickard *v.* Smith, 10 C. B., N. S. 473; Tarry *v.* Ashton, 1 Q. B. D. 314.
(*h*) 1 Q. B. D. 321.
(*i*) 7 H. & N. 826.
(*j*) Dalton *v.* Angus, 6 App. Ca., p. 829.
(*k*) 1 Q. B. D. 321.
(*l*) In Dalton *v.* Angus, 6 App. Ca., p. 791.
(*m*) Hughes *v.* Percival, 8 App. Ca. 443.

[1] *Ante* 591, note 2.

in those operations, which involved a use of the party wall exposing the other co-owners to risk, and that the responsibility could not be got rid of by delegating the performance of the operations to a third party.

Tarry v. *Ashton* (*n*), and cases of that class, were in 1882 distinguished by the Queen's Bench Division from cases such as *Ivay* v. *Hedges* (*o*). In the latter case the defendant was the landlord of a house, which was let out in apartments to several tenants, each of whom had the privilege of using the roof, which was flat, having an iron rail on its outer edge, for the purpose of drying clothes. The access to the roof was by means of a low door at the stair head about two feet from the rail. The plaintiff, the occupier of one of the rooms, went up on the roof for the purpose of removing some linen, when his foot slipped, and he fell through the rail (which was out of repair to the knowledge of the landlord) to the court below, and was injured. The court held that the mere licence to use the roof as a drying ground imposed no duty on the defendant to fence it, or keep it in repair (*p*).

Liability in respect of occupation.]—A person who employs a contractor, to whom he gives sole management of the work undertaken, may be liable in respect of his occupation or possession of the premises upon which the work is to be performed, for injuries caused by the negligence of the contractor or his workmen. In *Beaulieu* v. *Finglam* (*q*), which was an action in case for so negligently keeping a fire that the plaintiff's house and goods were burnt, Chief Justice Markham observed, "I shall answer to my neighbor for him who enters my house with my leave or with my knowledge, or who is a guest with me, or for my servant, if he or any of them does [★ 596] anything, as ★ with a candle or other thing, by which doing the house of my neighbor is burnt." So, where the owner of a house had employed a surveyor to do some work upon it, and there were several sub-contracts, and one of the workmen of the person last employed put some lime on the road, in consequence of which the plaintiff's carriage was overturned, it was held that the owner of the house was liable (*q*). Again, where an occupier employed a bricklayer to make a sewer, the former was held liable for injuries caused by the sewer being left open (*r*). In another case (*s*), the defendants, occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. During the process of lowering it from the warehouse the barrel fell, owing to the defectiveness of

(*n*) 1 Q. B. D. 314.
(*o*) 9 Q. B. D. 80.
(*p*) See also Batchelor *v.* Fortescue, 11 Q. B. D. 474.
(*q*) P. 2 H. 4, fo. 18, pl. 6.
(*q*) Bush *v.* Steinman, 1 B. & P. 404.
(*r*) 6 Esp. 6.
(*s*) Randleson *v.* Murray, 8 Ad. & E. 209.

a rope furnished by the master porter, and injured the plaintiff, and the defendants were held to be liable.

Summary.]—The rule of law appears to be, that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that whether his property is managed or dealt with by his own immediate servants, or by contractors or their servants (*t*). Such injuries, it has been said, are in the nature of nuisances; but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to movable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the management of others, who are not the servants of the owners (*u*).

SECT. 8.—*Injuries caused to Persons whilst assisting the Agent.*

There is an important class of cases in which the question raised is whether a person who has been injured whilst assisting the agents or servants of the defendant has any right of action ★ against the defendant for such injury. This class of [★ 597] cases may again be distributed under three heads:

(a.) Where the assistance of the injured party has been purely voluntary and uninvited.[1]

(b.) Where the assistance has been invited in a matter in which the injured party has a common interest.[2]

(c.) Where the assistance has been solicited, though in a matter in which the injured party has no common interest.[3]

First, as to the cases in which the assistance has been given voluntarily and in the absence of a common interest.]—As between master and servant, the common law rule is that the latter undertakes as between himself and his master to run all ordinary risks of service, including the negligence of a fellow-servant (*x*). Can a

(*t*) Per Mr. Justice Littledale, in Laugher *v.* Pointer, 5 B. & C. 564; see, too, per Lord Tenterden, *ib.*, and per Baron Parke, in Quarman *v.* Burnett, 6 M. & W. 499.

(*u*) Per Curiam, Quarman *v.* Burnett, *supra.*

(*x*) Wiggett *v.* Fox, 11 Ex. 839; S. C. 25 L. J., Ex. 188.

[1] A person who voluntarily assists the servants of another, in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on the master than a hired servant. Osborne *v.* Knox &c. R. Co. 68 Me. 49.

[2] Street Railway Co. *v.* Bolton, 43 Ohio St. 224. Thompson on Negligence, Vol. 2, 1045.

[3] Where an employé of a railroad company, engaged in the repair of a freight car, belonging to his employer, calls upon his son, a minor eleven years of age, to render him necessary temporary assistance in the work, and the son, while so assisting, without any negligence on his part or on the part of his father, is injured through the negligence of the agents and servants of another railroad company in backing a train of cars upon a side track where the car is being repaired, the latter company is liable for damages for the injury. Pennsylvania Company *v.* Gallagher, 40 Ohio St. 637.

person by volunteering his services have any greater rights or impose any greater duties than if he had been a hired servant? The question was much discussed in the year 1857, in *Degg* v. *Midland Rail. Co.* (*y*). The court took time to consider its judgment, not so much from any doubt on the merits of the dispute between the parties, as from a difficulty as to a point of pleading. The court was of opinion that it is as competent to a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid for it, he will take care of himself from the negligence of his fellow-servants, as it would be if paid for his services. The argument on behalf of the defendant was, however, that no such agreement could be implied, inasmuch as the deceased was a trespasser. Hence it was said, on the authority of *Bird* v. *Holbrook* (*z*); *Lynch* v. *Nurden* (*a*), and a dictum of Mr. Justice Maule in *Barnes* v. *Wood* (*b*), that an action might be maintained for injuries resulting from the negligence in this case—the shunting of trucks—of the defendants' servants. Baron Bramwell, however, who delivered the judgment of the court, remarked that it would certainly be strange that the case should be better if the deceased was a wrongdoer than if he had not been. At the same time the court was careful not to be understood as intending to lay down any general proposition that a wrongdoer never can [★ 598] ★ maintain an action; nor did it express any opinion upon the cases cited, although Baron Bramwell doubted whether *Bird* v. *Holbrook* could be supported. "It may be," it was said by the court, "that had the mischief here arisen from the personal act of the master, he knowing that the deceased was there, the master would have been liable . . . . If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing that, drives carelessly and injures that person, the servant may be liable; but why is the master to be responsible?" It was also pointed out in the judgment, that some acts are absolutely and intrinsically wrong, such as those which necessarily do injury; others again are wrong only from their probable consequences. For the former, when done by his agent, the principal is not liable, nor is he for the acts of the servant or agent which are not wrong in themselves, but become so for reasons personal to the servant and his wilful disregard of them; *e.g.*, when knowing of the danger attendant upon the performance of such acts, he nevertheless performs them. The master can be liable only when he has infringed a duty; as, for instance, if he ordered his servant to fire a gun near a highway, or if he orders him to ride in such a way as to injure a trespasser, whose presence was known to the former.

The principle of the above case was approved by the Exchequer

(*y*) 26 L. J. Ex. 171.
(*z*) 4 Bing. N. C. 628.
(*a*) 1 Q. B. 29; 10 L. J., Q. B. 73.
(*b*) 9 C. B. 392; 19 L. J., C. P. 195.

Chamber in *Potter* v. *Faulkner* (*c*). In that case the plaintiff was injured by the fall of a bale of cotton, but it appeared that he was invited by the defendant's servant to assist in the work, in the performance of which he was injured. It was argued for the plaintiff that in all the later authorities the exceptions from the operation of the principle upon which rest the maxims *Respondeat superior* and *Qui facit per alium, facit per se*, have been put upon the ground either that the master impliedly contracts with the servant not to be liable to him for the negligence of his fellow-servants, or that the servant when he enters the service impliedly takes the risks arising from the negligence of his fellow-servants. It was also suggested that *Degg* v. *Midland Rail. Co.* should be reconsidered, and that the plaintiff as a volunteer had a right of action.

The court considered the case to be that of one who volunteered to associate himself with the defendant's servant in the ★ performance of the defendant's work, and this without [★ 599] the consent, or even the knowledge, of the defendant. Such a person, it was said, cannot stand in a better position than those with whom he associates himself, in respect of their master's liability.[1] No great stress was laid upon the fact that the plaintiff had been requested by the defendant's servant to assist, nor was any question raised with respect to the authority of the servant to make the request. Consequently nothing was said of the effect upon a defendant's liability of a request to assist in a matter in which the injured person has no common interest, the request moving from the defendant. In subsequent cases, as will be seen this condition became important.

The principle of *Nicholson* v. *The Lancashire and Yorkshire Rail. Co.* (*d*), decided in 1865, and decisions of the same class, have been applied to cases in which persons have been injured whilst assisting the servants of the defendant. In that case, the plaintiff, a passenger, on alighting from the train was directed by the ticket collector to "pass on," and, in order to reach the place of exit, he walked with other passengers alongside the train. This was the usual and recognized practice. While so walking the plaintiff stumbled over a hamper and sustained injuries. It was contended for the plaintiff, that there was evidence of negligence, and that the facts amounted to an invitation by the company to use the path where the accident happened. The court adopted this view, and discharged a rule to enter a non-suit.

Where a person assists in a matter in which he has a common interest, and where his assistance is solicited, the case must be distinguished from that of master and servant or volunteer. If he is injured by the negligence of the servants, or by reason of the defective nature of the machinery or appliances, he has a remedy

(*c*) 31 L. J., Q. B. 30.
(*d*) 34 L. J., Ex. 84.

[1] *Ante* 597, note 1.

against the master. Reported cases go to this extent, but there appears to be little doubt that a person ceases to be a volunteer if his assistance was given upon request (*e*), assuming, of course, that the person who makes the request is acting within the scope of his employment in making such request.

In *Indermaur* v. *Dames* (*f*), decided in 1866, the defendant was a sugar refiner, at whose place of business there was a shaft [★ 600] ★ used for moving sugar. This shaft was necessary and usual in the business of a sugar refiner. Whilst it was in use it was properly kept open an unfenced. When it was not in use it was sometimes necessary to keep it open for proper ventilation; but it was not necessary when not in use that it should be unfenced. The plaintiff was a gasfitter employed by a patentee who supplied the defendant with his patent gas regulators, to be paid on condition that it effected a certain saving. For the purpose of ascertaining whether such saving had been effected, the plaintiff's employer sent him to test the action of the regulator, and whilst he was so employed he fell accidentally down the shaft, without any fault or negligence on his part, as the jury found, and was seriously hurt, A verdict for the plaintiff was upheld by the full court. To the argument that the plaintiff was a bare licensee, Mr. Justice Willes replied, it failed "because the capacity in which the plaintiff was there was that of a person of lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission." This decision was upheld in the Court of Exchequer Chamber.

In *Holmes* v. *The North-Eastern Rail. Co.* (*g*), decided in 1870, the plaintiff, who was consignee of a coal waggon which could not be unloaded in the usual way on account of the crowded state of the company's premises, with the permission of the stationmaster, went to his waggon and assisted in unloading it. It was the practice for consignees of coal, or their servants, to assist in unloading. While doing so he tumbled into a hole, and it was held that he was entitled to recover, because he was engaged with the consent and invitation of the defendants in a transaction of common interest to both parties, and was, therefore, entitled to require that the defendants' premises should be in a reasonably secure condition.

Of the judges of the court below, Barons Bramwell and Channell remarked that they found some difficulty in determining to what extent the plaintiff was a licensee. "If the plaintiff had gone where he did by the mere license of the defendants," said Baron Bramwell, "he would have gone there subject to all the risks attending his going. . . . I have had great doubt whether all such [★ 601] persons were not mere licensees, ★ and I have that doubt

(*e*) See per Cockburn, C. J., in Wright *v.* London and North Western Railway Company, *infra*.

(*f*) L. R., 1 C. P. 274; 2 *ib.* 311. And see Ivay *v.* Hedges, 9 Q. B. D. 80; and Batchelor *v.* Fortescue, 11 Q. B. D. 474 (1883).

(*g*) L. R., 4 Ex. 254; affirmed, *ib.* 6 Ex. 123.

still; for the defendants might at any time say to them 'You have no right to go there,' and prevent them from doing so. Still, I think they come within the description of persons invited to go there, in the same sense in which persons are invited to walk into a shop. They are persons who are in effect told that they may safely do that which it is for the convenience of both parties to have done. *Nicholson* v. *Lancashire, &c. Rail. Co.* (*h*) is in favour of this view." This case is one of great authority, because the decision is supported by the unanimous decision of the Court of Exchequer, as well as of seven judges in the Exchequer Chamber, who adopted the reasons given in the court below (*i*).

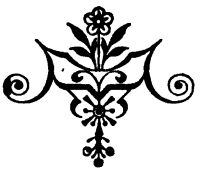
The principle was thus established that when a person, being on the premises of another for the purpose of carrying into effect a contract of carriage and delivery, gets the assent of that other person to assist in the work as indicated in the usual course of business, he is entitled to redress, if the part of the premises where he is engaged is in a condition which is dangerous for the person engaged upon it, and injury results to him. The same principle was held to be applicable where the defendants contracted to carry an heifer by train, and the plaintiff, on the arrival of the train at its destination, with the assent of the stationmaster, assisted to shunt the horse-box in which the heifer was, and was injured in so doing by the negligence of the defendants' servants. "The plaintiff," said Lord Coleridge, "was not here a volunteer; if so, he would have been bound to take the risk; nor is his the case of a master and servant, if so, he could not have recovered, as the master would not have been liable for the negligence of his fellow-servants; but it is a case where a railway company, who are bound to deliver certain goods, allow him to take part in that delivery, and they are bound to see that he is not injured."[1] At the same time, it cannot be laid down as a rule, that every person who is entitled to receive goods from a defendant is entitled to assist the servants of the defendant; but, probably, the rule would apply where the assistance is given for the convenience of the defendant, and is sanctioned expressly or impliedly (*k*).

(*h*) 34 L. J., Ex. 84.

(*i*) See per Lord Coleridge, in Wright *v.* London and North Western Railway Company, L. R., 10 Q. B. 298.

(*k*) Wright *v.* London and North Western Railway Company, L. R., 10 Q. B. 298; 33 L. T. 830; 1 Q. B. D. 252. See, too, Trebutt *v.* Bristol and Exeter Railway Company, L. R., 6 Q. B. 73.

[1] *Ante* 597, note 2.



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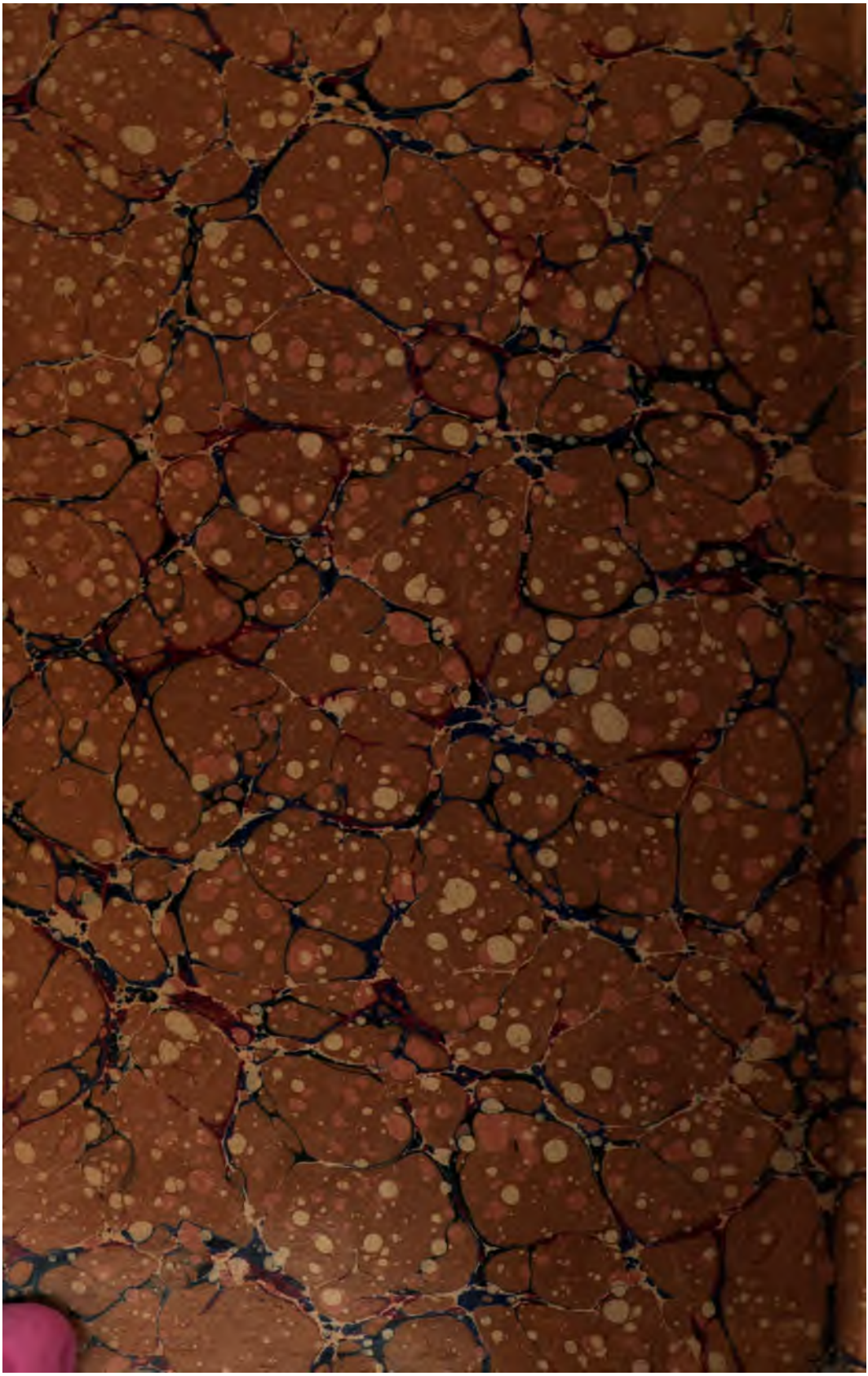

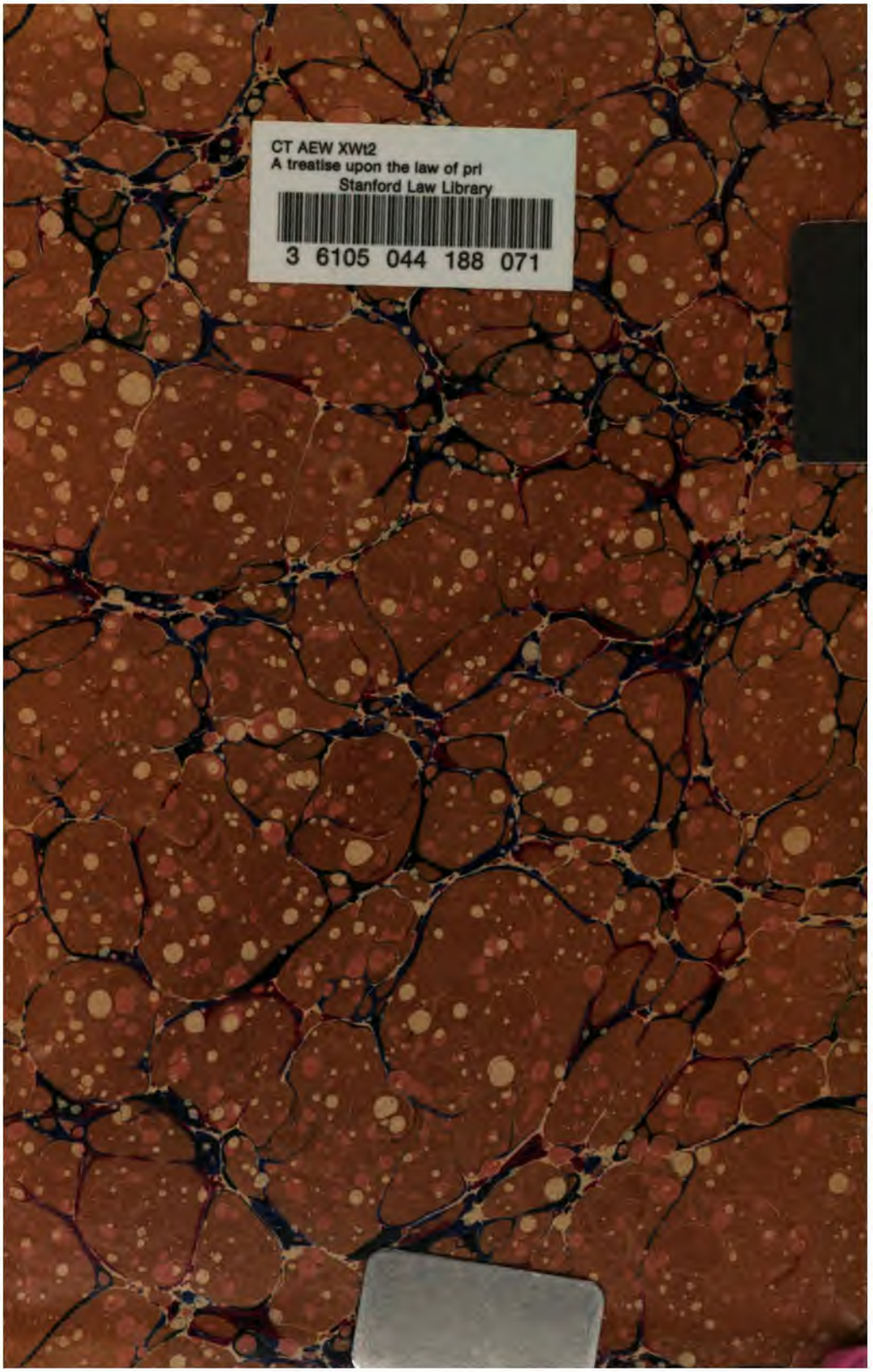
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